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IN THE CIRCUIT COURT

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FOREWORD

With the tremendous expansion, in the past three decades, of law both in quantity and complexity, stimulated successively by the Depression, World War II and inflated prosperity—all three of which have evoked attempted solutions in more regulatory measures, state and federal - law schools have sought to keep pace by expanded curricula and post-admission education through conferences and institutes. In the emphasis on new subjects, in the fields of Labor, Oil and Gas, Taxation, Administrative Law, Credit Transactions and Corporate Finance, to mention a few, we are prone to give less time and thought to the older procedure, of which, we in Mississippi, have retained possibly more than our just share. We somehow tend to believe there is no need to grease the rear wheels on the assumption that if we make the front wheels go, the rear will be bound to follow.

The December issue of 1952 (Vol. XXIV No. 1) is a Symposium on Mississippi Writs. This number may be considered a sequel rounding out our basic procedure both in law and equity. To be complete, a treatment of practice in the circuit court should contain a dissertation on *Counter-Claims* but since this subject is so ably discussed by Hon. Joe H. Daniel in the May issue of 1954 (Vol. XXV No. 3, page 254) it is not repeated but is incorporated by this reference. So much for belatedly greasing the rear wheels.

Ordinarily the JOURNAL is restricted to quarterly publication by budget considerations as well as lack of summer editoral man-power. Last summer an extra issue annotating the Rules of the Supreme Court was made possible. The encouragement received from the Mississippi State Bar has enabled us to make this supplementary publication. We hope this second extra effort will be equally appreciated.

Robert J. Farley
Dean, School of Law
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Mississippi Law Journal

VOLUME XXX AUGUST, 1959 NUMBER 4

VENUE AND JURISDICTION IN THE CIRCUIT COURT

*Vardaman S. Dunn**

I. GENERAL DISCUSSION

A. Scope of Article

The general statute applicable to actions in the circuit court is the basis of the discussion under this subdivision.[1] It does not include, except where analogous, the subject of venue and jurisdiction in the chancery court, justice of the peace courts and special tribunals, or under special statutes dealing with particular actions, suits or proceedings which are otherwise provided for.[2]

B. Definition of Terms Used

In order to avoid confusion and repetition, terms used herein are defined as follows:

Venue: Has reference to the permissible place of commencing and maintaining suit, as distinguished from jurisdiction of the subject matter.

Local Defendant: Means a defendant, individual or corporate, domiciled or residing in the county where the suit is commenced and sought to be maintained.

Non-local Defendant: Means a defendant, individual or corporate, not domiciled or residing in the county where the suit is commenced and sought to be maintained.

Foreign Defendant: Means a defendant, individual or corporate, who is a non-resident of the state.

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[1]Miss. Code Ann. § 1433 (1942).

[2]Except where otherwise provided, actions on the law side of the county courts of which the circuit court has concurrent jurisdiction, are controlled by the circuit court venue statutes; those on the chancery side by the chancery venue statutes. Miss. Code Ann. § 1606 (1942).

C. Construction of Statutes

With few exceptions, the statutes fully cover the subject of venue, and the common law rules have no application.[3] The legislature, so long as it does not unreasonably discriminate between litigants or classes of litigants, is the sole judge of the venue of actions and may fix it in one or more places according to its judgment of convenience and justice.[4] The statutes have been construed reasonably and without any tendency on the part of the court toward that strictness of interpretation so often found in connection with procedural acts, but due regard has been given to legislative intent and sound justice.

D. The General Statute

The general statute that controls the venue of a vast majority of cases in the circuit court provides as follows:[5]

> "Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of they may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some sureties,

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[3]Also, the rule is that where a special statute deals with a special or particular subject, the special and particular statute controls over the general venue statute. See Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947). More or less comprehensive statutory venue provisions have been in existence in the state from the earliest times. The statute in the form found in the Code of 1930 was enacted in 1918 (Miss. Laws 1918, c. 149) to insert the clause providing for venue of actions against domestic corporations and making special provisions for public officers. In 1940, the statute was amended to add a provision covering public officers, but otherwise it remained the same (Miss. Laws 1940, c. 248). With the substantial re-enactment of this statute, legislative sanction has been given to the judicial interpretation prior to 1940.

[4]Clarke v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302 (1930); Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930).

[5]Miss. Code Ann. § 1433 (1942). Special statutes control over the general statute. Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947). In rem actions, other than those specified, are excluded. See Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534 (1928).

on his bond, or other joint defendant, sued with him, be found or be subject to action in such county, the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."[6]

E. Limitation of Statute — In General

By its express terms the general statute is limited to "civil actions[7] of which the circuit court has original jurisdiction." Thus, it is held that the statute has no application whatever to causes of action within the jurisdiction of justices of the peace; so a public officer, sued in a justice court, is not entitled to invoke the statute on appeal.[8] However, the express limitation must, of course, give way to special conformity statutes by which the general circuit court act is expressly made to control.[9]

II. TIME FOR FIXING VENUE

The venue statute provides that actions shall be "commenced" in certain designated places. Another section of the code provides that "an action shall, for all purposes, be considered to have commenced and be pending from the time of the filing of the declaration, if a summons shall be issued thereon for the defendant, and, if not executed, other like process, in succession, may be issued, in good faith, for the defendant."[10] Another section provides for the issuance of alias, pluries and testatum writs if the original process be returned "not found."[11]

Accordingly, venue is fixed as of the commencement of the action and not necessarily when process is served. Thus, where the declaration is filed against a defendant domiciled[12] at the time in the county where suit is instituted, the territorial jurisdiction of the court immediately attaches,

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[6]Miss. Laws 1940, c. 248, re-enacted the statute exactly as it appears in the Code of 1930, with the addition of the phrase: "whether such suit is filed before or after such officer's term of office has expired."

[7]For distinction between civil and criminal actions, see Annot., 102 A. L. R. 397 (1936). See, also M. &. O. Ry. Co. v. State, 51 Miss. 137 (1875).

[8]Womack v. Richardson, 168 Miss. 748, 151 So. 175 (1933). See Yalabusha County v. Carbry, 6 Miss. 529 (1844), involving an appeal from a police court, wherein the same result was reached.

[9]For example, the venue in actions in the county court of which the circuit court has concurrent jurisdiction (Miss. Code Ann. § 1606 (1942), and, in certain features, chancery suits (Miss. Code Ann. § 1276 (1942); Griffith, Mississippi Chancery Practice § 158 (2d ed. 1950)), are controlled by the circuit court act. In chancery generally, different venue provisions apply. Brashier v. O'Connor & Sons, 181 Miss. 872, 180 So. 67 (1938); McRae v. Ashland Plantation, 187 Miss. 350, 192 So. 847 (1940).

[10]Miss. Code Ann. § 1463 (1942). This statute is expressly limited to actions in the circuit court and applies unless otherwise provided.

[11]Miss. Code Ann. § 1850 (1942).

[12]Excepting domicile, the defendant must be found by service of process.

subject to the issuance in good faith of process,[13] and it may not be defeated by the act of the defendant in changing his domicile and moving out of the county before process can in due course be served upon him.[14] The plaintiff in such cases may have a testatum writ [15] or in some instances an attachment.[16]

III. CLASSES OF LITIGANTS COMPARED — IN GENERAL

Three classes of litigants are expressly dealt with in the general statute: (1) individuals, (2) domestic corporations, and (3) public officers, and except as to local actions, the rights and liabilities vary. The classification has been sustained against constitutional objections.[17] Actions are classed as either transitory or local, depending upon the subject matter.[18]

IV. TERRITORIAL JURISDICTION — IN GENERAL

Generally speaking, an action may be commenced in any county where any proper party defendant may be found. If process is served upon a defendant so found, the court is said to acquire territorial jurisdiction and process may issue to any other county for a joint party defendant.[19] On such state of the record the court may proceed to a determination of the action, unless it is divested of venue by the assertion on behalf of a party entitled thereto of the right of removal. On the other hand, if no proper party defendant is found and served within the county by one of the methods authorized by law, service of process upon a nonlocal defendant, regardless of his classification, will not vest the court with territorial jurisdiction, and a default judgment based upon the ineffective service is voidable, if not void.[20] The defendant, or defendants,

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[13]Miss. Code Ann. § 1463 (1942).

[14]Andrews v. Powell, 41 Miss. 729 (1868).

[15]Miss. Code Ann. § 1850 (1942). Andrews v. Powell supra note 14. An instance of this type will rarely arise. Should it arise, the case cited should be consulted for the form and showing necessary for the testatum writ. An order of court is necessary to support the testatum writ and a showing and record must be made of the facts of removal of the defendant after commencement of the suit.

[16]McNair v. Kaiser, 62 Miss. 783 (1885).

[17]Pan American Petroleum Corp. v. Pate, 157 Miss. 822 (1930) (officers); Morrimac Veneer Co. v. McCalip, 129 Miss. 671, 92 So. 817 (1922) domestic corporations): Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930), citing Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927), and Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 49 A. L. R. 713 (1926) (foreign and domestic corporations); Clarke v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302 (1930) (foreign corporations—railroads).

[18]See Subdivision VIII.

[19]Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931), and cases cited throughout this article.

[20]Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930); Cook v. Pitts, 111 Miss. 893, 74 So. 777 (1917); Campbell v. Triplett, 74 Miss. 364, 20 So. 844 (1896); Wooley v. Bowie, 41 Miss. 553 (1867); Pate v. Taylor, 66 Miss. 97, 5 So. 515 (1889); Spain v. Winter, Walk. 152 (Miss. 1824); McLeod v. Minor, 42 Miss. 517 (1869); Bank of Vicksburg v. Jennings, 5 How. 425 (Miss. 1841); Andrews v. Powell, 41 Miss. 729 (1868).

in such case may take either of three courses of action: (1) he may appear and obtain a change of venue, if he is one of a class authorized to assert the right of removal,[21] (2) he may suffer judgment by default and thereafter appeal directly[22] or (3) he may suffer judgment by default and thereafter set it aside in a collateral attack, as by proceeding to quash a writ of execution issued thereunder.[23] On the other hand, territorial jurisdiction may be waived by the entry of a general appearance and by pleading to the merits.

V. WHERE DEFENDANT FOUND

A. Classification of Litigants

The general statute is mandatory in requiring that suit "shall be commenced in the county in which the defendant or any of them may be found." Provisions for domestic corporations are also found in this statute. Generally speaking, an individual, regardless of his class may be found in any county in which he is physically present for the service of process or in the county of his household and residence. A domestic corporation may be found in the county of its domicile or where the action accrues. Foreign corporations that have qualified to do business in the state, although not expressly included within the statute, may, by analogy, be found in its established Mississippi domicile or where the cause of action accrues. Foreign corporations that have not qualified may, by reference to another section of the code, be found wherever it has an agent subject to process. Once found a defendant may or may not be entitled to a removal of the action to another county, depending upon the class to which he belongs and the circumstances. All of these matters are later developed at some length in this article. The discussion under the present heading excludes the question of the maintenance of venue by the joinder of a local co-defendant. It has to do only with the circumstances under which a defendant may be found so as to confer venue upon the court by service of process upon him, and without regard to any possible removal rights.

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[21]In Cook v. Pitts, 114 Miss. 46, 74 So. 777 (1917), it was held that the defendant might obtain a change of venue to the county of his domicile.

[22]Andrews v. Powell, 41 Miss. 729 (1868), holding that where process is served on the only defendant, an individual, in a county other than that in which suit was commenced, it will not be presumed in aid of a court of general jurisdiction that the defendant was domiciled in the county when suit was commenced, but the cause will be reversed. Wooley v. Bowie, 41 Miss. 522 (1867) (reversed and dismissed).

[23]In Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930), the question arose at a subsequent term in a proceeding by the defendant, against whom a default judgment had been entered, to quash a writ of execution issued under the judgment and to vacate the judgment as utterly void. On appeal from the action of the lower court in denying the relief sought, the cause was reversed. It was held that "the judgment was voidable, if not void, in this state of the record. . . . [T]he court had no jurisdiction" over the defendant.

B. Individual Defendants — Where Found

An individual defendant may be found in either one of two places. He may be found in the county of his domicile wherein he maintains his usual place of abode,[24] since, if he is not physically present, jurisdiction may be obtained by secondary service;[25] or in the county where he is served personally with the process of the court, provided that he is served while physically present within the territorial boundaries of the county where the suit is pending and provided further that his presence is not the result of fraud or improper device chargeable to the plaintiff. He may not be found elsewhere.[26]

C. Fraudulent Device in Finding Defendant

Omitting for the present the question of fraudulent joinder of parties, attention is here focused upon the subject of venue or jurisdiction where the element of fraud appears in finding the defendant in the county where suit is pending.

The statute merely fixes the venue in the county where the defendant is found. It would follow that insofar as the statute is concerned jurisdiction would not be affected by the method employed in finding the defendant. However, where fraud appears the court is vested with powers wholly independent of statute. Thus, it is held that a court will not take jurisdiction in a civil case based on a service of process on a defendant who is brought within the reach of its process wrongfully, fraudulently, by deceit or any other improper device; provided that the wrongful conduct is chargeable to the plaintiff.[27] The rule is based not on a lack of jurisdiction but on the view that it is improper for a court to exercise a jurisdiction so obtained. Such conduct amounts to a fraud upon the defendant and upon the jurisdiction of the court.[28] On the other hand, a defendant may voluntarily submit to the jurisdiction of the court by entering the county for the sole purpose of receiving process; but where collusion between the plaintiff and the appearing defendant is involved, jurisdiction so obtained will not extend to a joint defendant.[29]

D. Domestic Corporations

While in some respects foreign corporations are governed by the

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[24]Individual domicile is discussed later. See subdivision VI G.
[25]Miss. Code Ann. § 1859 (1942).
[26]See note 20 supra.
[27]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937); McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940).
[28]Nicholson v. Gulf M. & N. R. Co., supra note 27.
[29]Ibid.

same rules, the subject discussed in this and immediately succeeding sections is restricted to purely domestic corporations.

The general statute provides specially for service on domestic corporations as follows: ". . . and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided . . . ."

It is quite clear from the statute itself that a plaintiff has the privilege of commencing his action and maintaining venue against a domestic corporation either in the county of its domicile or where the cause of action may occur or accrue. In other words, such defendant may be found within the meaning of the statute in either of the places mentioned.[30] But there remains yet to be solved, by reference to the decisions, several troublesome questions. They are those which relate to the exclusiveness of the enumerated places, to location of the corporate domicile and to the place where a cause of action may occur or accrue.

(1) *Exclusiveness of Specified Counties*

Despite the loose dictum to be found in some of the decisions indicating a contrary view,[31] it is now well settled that a domestic corporation may be found in no other county save that of its domicile or where the cause of action may occur or accrue. Thus, it is held that a domestic corporation may not be found for venue purposes in a foreign county merely by reason of the fact that its agent is physically present or residing therein, or that it is there exercising its franchise by conducting a branch of its business in charge of its agents.[32] In this respect venue of the domestic corporation differs from that of a non-qualified foreign corporation.

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[30]Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931); Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916).

[31]See Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920) and comment upon that case in Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925).

[32]Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916). It is interesting to note that this case was decided under tthe provisions of the Code of 1906. At that time, the general circuit court venue statute (Code 1906, Sec. 707) did not mention a corporation but laid the venue as to all defendants in the county where found. The result was reached by reference to the code section (Code 1906, Sec. 3932) which is now Miss. Code Ann. § 1866 (1942), having to do with process generally. The court concluded that the legislative intent was to place the venue of domestic corporations in the county of its "principal place of business," which was held to be synonomous with "domicile." It was reasoned that the legislature intended to grant immunity from the expense and inconvenience which would result from the sending of the corporate records and witnesses to distant counties and to compensate for the denial of the right of removal accorded only to individuals. See also: Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930); McLeod Lumber Co. v. Manassa Lumber Co., 180 Miss. 552, 178 So. 83 (1938); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

(2) *Location of Corporate Domicile*

Like an individual,[33] a domicile is imposed upon a domestic corporation at birth. One section of the code chapter on corporations[34] requires a specification of domicile to be included in the charter. Another section[35] requires that every domestic corporation maintain an office in the county of its domicile in charge of some officer or a designated resident agent upon whom process may be served, and in default thereof, the secretary of state is made the process agent.

It follows from these statutes that the legal domicile of the corporation is fixed when the charter is granted. There can be only one domicile at any given time, and once established, the domicile remains until a new one is acquired.[36]

A corporation, unlike an individual, may not change its domicile at will where it is fixed by law, as in this state, but only as authorized by law.[37] Thus, the domicile may be changed by amendment of the corporate charter[38] or by appropriate corporate action, as by resolution, where such method is authorized by the charter;[39] provided, however, that the formal change is followed or accompanied by actual removal from the county of the original domicile to that of the new.[40] The mere exercise of its franchise in a county foreign to that of its domicile does not confer venue on such county.[41] It would seem to follow that in the absence of a formal change, the charter-domicile would remain the exclusive venue-domicile even if the corporation conducts its principal place of business in a foreign county.[42]

33See 17A Am. Jur., Domicile § 3.
34Miss. Code Ann. § 5310 (1942).
35Miss. Code Ann. § 5319 (1942).
36Estes v. Bank of Walnut Grove, 173 Miss. 499, 159 So. 104 (1935).
3718 C. J. S., Corporations § 176 (c).
38Miss. Code Ann. § 5323 (1942).
39Estes v. Bank of Walnut Grove, 173 Miss. 499, 159 So. 104 (1935).
40Ibid.
41Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916).
42The case of Plummer-Lewis Co. v. Francher, supra note 41, was decided at a time when the general venue statute made no special provision for corporations. The question was whether, under the statute as it then existed, a domestic corporation might be found for venue purposes in a county in which it exercised its franchise through a branch office but which mantained its principal place of business in another county designated as its domicile by charter. By reference to the general statute on process, the court interpreted the legislative intent as being that a domestic corporation was subject to suit only in the county of its "principal place of business" which was held to be synonymous with "domicile." Since that case, the general venue statute was amended to take its present form in which the term "domicile" is used. As pointed out in the Plummer-Lewis case, the spirit of the law was to exempt domestic corporations from the expense and embarrassment of sending their records and agents into foreign counties to defend suits and in this respect to compensate for the denial of the right of removal given an individual. However, it is quite apparent that a domestic corporation has under the recent statutes, a right to select its domicile by compliance with the statutory requirements, and this is so despite the fact that its "principal place of business" is maintained elsewhere. Insofar as the Plummer-Lewis Co. case is authority for the proposition that venue is obtainable by "principal place of business" where such place does not coincide with the charter-domicile, it is nullified by the amendment of the venue statute and enactment of Sec. 5319 in 1928.

(3) *Where Cause May Occur or Accrue*

The general statute provides in the alternative that suit shall be commenced against domestic corporations in the county where "the cause of action may occur or accrue."[43]

Recognizing a diversity of opinion upon the subject,[44] our court has defined the term "cause of action" as referring to "a right to institute and carry on an action," and not to the facts giving rise to an action. It is further held that the term "occur" and the term "accrue" are used to mean the equivalent of "accrue," which, in turn, is defined as meaning "to come into existence as an enforceable claim; to vest as a right."[45]

A cause of action occurs or accrues within the meaning of the statute when,[46] and in the locality where, the right to institute suit comes into existence. Such right can mature only in the county where the final act occurs.[47]

In personal injury actions, the cause of action accrues in the county where the injury is inflicted or the person of the injured party is impinged upon. Several decisions illustrate the rule. In an action for damages resulting from drinking a beverage containing foreign substances, the venue is in the county where the beverage is consumed and not where it is bottled.[48] In actions for negligence producing death, the venue is laid in the county where the injury is inflicted and not where the negligent omission originates[49] or where death subsequently results.[50] In this latter respect, the right to sue accrues the instant that the injury is inflicted and not before, although the cause of injury may have orig-

[43]Failure to designate a process agent under Sec. 5319 (Miss. Code Ann. § 4140 (1930)) does not prevent venue being maintained in the accrual county. In this respect domestic and foreign corporations are governed by different rules. Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

[44]The diversity was referred to in Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936). The different shades of meaning that may govern, depending upon the subject under consideration, are referred to in Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

[45]Grenada Bank v. Petty, supra note 44; Forman v. Miss. Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[46]Cox v. American Freehold & L. Mfg. Co., 88 Miss. 88, 40 So. 739 (1906); Johnson v. Pyles, 19 Miss. 189 (1848); Central Trust Co. v. Meridian Light & Ray Co., 106 Miss. 431, 63 So. 575, 51 L. R. A. (n. s.) 151 (1913); Graham McNeil Co. v. Scarbrough, 135 Miss 59, 99 So. 502 (1924); Atlantic Life Ins. Co. v. Serio, 171 Miss. 726, 157 So. 474 (1934), cited in Grenada Bank v. Petty, supra note 45.

[47]See 133 A. L. R. 260 and case cited notes 48 - 54 infra.

[48]Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936).

[49]See Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977 (1883). This case involved a question of conflict of laws. Said the court: "Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and vice-versa; but the omission of some duty in Mississippi cannot transfer a consequence of it manifested physically in another state to Mississippi." See also Ala. G. S. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163 (1892), wherein the Mississippi rule is referred to and followed. As pointed out and demonstrated in 133 A.L.R. 260, the rule is in accord with the great weight of authority.

[50]See 133 A.L.R. 260.

inated elsewhere and at a different time.[51] Subsequent death may increase the damages and alter the parties entitled to bring and maintain suit, but the place where the cause of action accrued is not changed.[52]

Other cases involving tort actions illustrate this rule. Thus, in an action for malicious prosecution, the venue is in the county where the plaintiff is tried and acquitted and not where he is taken into custody, since the right of action does not come into existence until the prosecution terminates in the plaintiff's favor.[53] In an action for damages resulting from the pollution of a stream by the defendant's factory, the venue is in the county where the damage is caused to the plaintiff's property and property rights and not where the obnoxious matter is deposited in the stream. It is observed in this case that although the "cause of injury" originated in another county, it was harmless until the damage resulted therefrom.[54] An action for libel contained in a newspaper occupies a special field, since it is held that the action accrues where the paper is published and not elsewhere.[55]

This statement of the rule is not limited to tort actions, and no reason appears why the test should not apply to actions on or for the breach of contract. Only one decision has been found from this jurisdiction specifically treating the subject in reference to venue. It is held that a cause of action for breach of contract accrues in the county where performance is due. In a claim for breach of a contract of sale and delivery, the cause accrues in the county where the article was to have been delivered and installed.[56]

E. Foreign Corporations

(1) *In General*

For venue purposes corporations organized outside of the state may be classified as domesticated corporations, qualified corporations and non-qualified corporations. The corporations that have become domesticated are specifically provided for by statute.[57]

Foreign corporations are not expressly mentioned in the general venue statute.[58] The process statute applicable generally to foreign corporations makes no direct reference to venue as such, but provides that

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[51]Ibid.

[52]Ibid.

[53]Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

[54]Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933).

[55]Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[56]See Southern Wholesalers v. Stennis Drug Co., 214 Miss. 461, 59 So.2d 78 (1952). See also 92 C.J.S., Venue § 30.

[57]Miss. Code Ann. §§ 5339-42 (1942). Such corporations are placed on the same basis as domestic corporations, but they remain non-residents within the provisions for attachment and removal to the federal court. See Southern Motor Express Co. v. Magee Truck Lines, 181 Miss. 223, 177 So. 653, 114 A.L.R. 1377 (1937).

[58]Miss. Code Ann. § 1433 (1942).

"Process may be served upon any agent of said corporation found within the county where the suit is brought."[59] Another section provides that all foreign corporations doing business in this state shall be subject to suit to the same extent as domestic corporations.[60] The corporation act of 1928 provides for qualification of foreign corporations in this state and the appointment of a resident process agent.[61] This statute does not require the foreign corporation to maintain an office in charge of the process agent or officer or other agent, as in the case of domestic corporations.[62] There is no statute specifically fixing the domicile of foreign corporations, as in the case of domestic corporations. Bearing these statutes and comments in mind, a discussion of the venue rules governing the different classes of foreign corporations follows.

(2) *Qualified Corporations*

Foreign corporations doing business in this state are required by statute to file with the secretary of state a copy of the charter and a written power of attorney "designating the secretary of state or in lieu thereof an agent" upon whom service of process may be had in the event of suit.[63]

In view of this statute and the constitutional limitations against discrimination, it is held that the qualified foreign corporation has the same rights and is subject to the same disabilities as domestic corporations insofar as venue is concerned. The rule has been stated as follows:[64] where a foreign corporation, doing business in the state, has fully qualified under the act by filing its charter and appointing a resident agent for the service of process, it stands, as to venue, in the identical position of a domestic corporation. It may be sued and the venue sustained either in a county where the cause of action occurred or accrued or in the county of its domicile where its designated agent resides. If sued where the cause of action accrues, process may issue to and be served upon the process agent in another county where he resides. In other words, it may be found in either of the places where a domestic corporation may be found, and, as in the case of a domestic corporation, it may not be found elsewhere merely because an agent is served with process or merely because it may be found exercising its franchise in a county other than that of its domicile.[65]

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[59]Miss. Code. Ann. § 5346 (1942).

[60]Miss Code. Ann. § 5345 (1942).

[61]Miss. Laws 1928, c. 90, Miss. Code Ann. § 4140 (1930); Miss. Code Ann. § 5319 (1942).

[62]Miss. Code Ann. § 5319 (1942).

[63]Ibid.

[64]See Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930), followed in Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[65]Accord, McLeod Lumber Co. v. Manassa Timber Co., 180 Miss. 552, 178 So. 83 (1938), holding that where the action accrues without the state, the venue cannot

VI. RIGHT OF REMOVAL OR DISMISSAL

If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence and in a court having no venue, the venue shall be changed, on his application before the jury is impaneled, to the county of his household and residence.[66] Since the act of 1940, a corporate objection to venue, if sustained, will result in a transfer of the case and not a dismissal as was the case before.[67]

A. Public Officers

A public officer is given the right of removal, but his position is different from that of an ordinary individual in that lawful joinder of a local defendant does not defeat the right of removal.[68] The provision as to public officers was to prevent taking the officer away from his jurisdiction and thus interfering with the administration of his official duties.[69] However, the statute extends the right to suits filed after the officer's term of office expires.[70] The provision is not invalid as discriminatory, since there is a substantial reason for the special classification.[71]

Executors and administrators are not public officers in the sense of this statute and they stand on the same footing as individuals for venue purposes.[72]

However, the right of a public officer to trial in the county of his household and residence is not absolute in all circumstances. The right

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be maintained in the county of the plaintiff's residence, but must be laid in the county where the corporation has its place of business and where its process agent resides. See also Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931), where the Sandford case referred to Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933). The rule in the Sandford case is based upon a consideration of Miss. Code Ann. §§ 495, 4140 (1930) (Miss Code Ann. §§ 1433, 5319 (1942)) and the constitutional limitation against discriminatory legislation as discussed in Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927) and Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 49 A.L.R. 713 (1926). The conclusion is that any other construction of the statutes would render the same unconstitutional as an unlawful discrimination between domestic and foreign corporations. Consideration was also given to Miss. Code Ann. § 4166 (1930) (Miss. Code Ann. § 5345 (1942)), declaring that all foreign corporations doing business inthis state shall be subject to suit here to the same extent that corporations of this state are, as applying primarily to substantive matters but as indicating the legislative policy. The law was expressly left the same as to non-qualified corporations. Expressly excluded from decision were questions arising as to insurance companies, railroad companies and companies having designated only the secretary of state as process agent.

[66]Miss. Code Ann. § 1433 (1942).

[67]See subdivision VI B.

[68]Miss. Code Ann. § 1433 (1942). Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950). Prior to amendment in 1926 (Miss. Laws 1926, c. 155), the public officer was on the same footing as an ordinary citizen. See Dean v. Brannan, 139 Miss. 312, 104 So. 173 (1925); State v. Cloud, 146 Miss. 642, 112 So. 19 (1927).

[69]Pan American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480, *suggestion of error overruled*, 128 So. 870 (1930).

[70]Miss Code Ann. § 1433 (1942).

[71]See note 69 supra.

[72]Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951).

does not prevail against the right of a co-defendant to a change of venue because of local prejudice,[73] and it is to be noted also that the right applies only in circuit court actions where the circuit court has original jurisdiction. Thus, a public officer sued in a justice court cannot avail himself of the right of removal on appeal to the circuit court.[74] Also, where other specific statutes apply, such specific statutes control over the general venue statute. Thus, it is held that the right of removal does not exist in a special proceeding against the officer by motion for failure to levy execution, since the statute[75] requires presentation before the court to which the execution is returnable.[76]

B. Corporations

In reference to the right of removal, the statute makes no reference to corporations. It has been held that corporations have no right of removal of a cause. The result is that on valid objection to venue by a corporate defendant, the suit is simply dismissed without prejudice.[77] But in 1940, a general statute, applicable to all defendants, was enacted, whereunder a case brought in the wrong venue may not be dismissed but it "shall, by the court, be transferred to the venue to which it belongs."[78]

C. Individuals — Basis of Right

The individual defendant may assert the right to a change of venue to the county of his household and residence whenever there is no co-defendant, properly joined, against whom the venue is lawfully maintainable. For example, when the plaintiff states a cause of action in good faith against a local co-defendant, whether individual or corporate, properly joined as a defendant in a joint cause of action the non-local defendant has no right of removal.[79] The same rule applies whenever the co-defendant, properly joined, is made subject to the venue by the statutes, as when a corporation is joined and suit is in the county where

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[73]Miss. Code Ann. § 1443 (1942); Tucker v. Gurley, 176 Miss. 708, 170 So. 230 (1936).

[74]Womack v. Richardson, 168 Miss. 347, 151 So. 173 (1933); Yalabusha County v. Carbry, 6 Miss. 529 (1844).

[75]Miss. Code Ann. § 4244 (1942).

[76]Womack v. Richardson, 168 Miss. 347, 151 So. 173 (1933).

[77]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937).

[78]Miss. Code Ann. § 1441 (1942). This statute was mentioned but not applied in Ravesies v. Martin, 190 Miss. 92, 199 So. 282 (1940). It was applied in State ex rel. Cowan v. State Highway Commission, 195 Miss. 657, 13 So.2d 614 (1943). It was not mentioned and was apparently overlooked in Foreman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943) and in Ainsworth v. Blakeney, 98 So.2d 880 (Miss. 1957).

[79]Daniel v. Livingston, 168 Miss. 311, 150 So. 622 (1933); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920); Miss. Power & Light Co. v. Lowe, 179 Miss. 377, 175 So. 196 (1937); Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925); Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951).

the cause of action against it accrued or where a foreign individual co-defendant, in the absence of fraud, is physically found and served with process in the county.[80]

D. Procedure for Removal — Waiver

The change of venue is accomplished by "application," which generally takes the form of a motion. The application must be filed and presented before the jury is impaneled,[81] provided the condition has then arisen. In the event that such application is improperly granted, the plaintiff may file a motion to remand. This motion is filed in the court to which the action is removed and the refusal of that court to sustain the motion may be reviewed on appeal. In such cases the Supreme Court will reverse and may remand to the court in which the action was improperly tried with directions to transfer to the court having the proper venue.[82]

It is held that the right of removal may be asserted and the action removed whenever the condition therefor arises,[83] unless the right has been waived.[84] From this it follows that the application need not, under all circumstances, be made before the jury is impaneled or before a plea to the merits is interposed. The different situations which may be presented are discussed below. But venue is a personal privilege and may be waived.[85]

If the right to a change of venue is apparent from the declaration of proceedings, the application should be made promptly and before any plea to the merits is filed. Ordinarily a plea to the merits is a waiver,[86] but if timely application is made the court may allow the plea to be withdrawn and the application for change of venue filed.[87] Permission to withdraw a plea to the merits in this connection is discretionary with the trial court.[88] However, under the more recent pleading stat-

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[80]See note 79 supra; also Pan American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480 (1930); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920), and cases cited therein.

[81]Miss. Code Ann. § 1433 (1942).

[82]Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933).

[83]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Tucker v. Gurley, 176 Miss. 708, 170 So. 230 (1936).

[84]Howard v. Ware, supra note 83; Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920).

[85]Catlett v. Drummond, 113 Miss. 450, 74 So. 323 (1917); Stanley v. Cruise, 134 Miss. 542, 99 So. 376 (1924); Halliburton v. Crichton, 147 Miss. 621, 111 So. 743 (1927); Indianola Cotton Oil Co. v. Crowley, supra note 84; In Ainsworth v. Blakeney, 98 So.2d 880 (Miss. 1957), it was held that an objection to venue in the form of a motion at the conclusion of the plaintiff's evidence was not timely and that venue was waived.

[86]Grenada Bank v. Petty, 174 Miss. 414, 164 So. 316 (1936); King v. Ainsworth, 83 So.2d 93 (Miss. 1955).

[87]Grenada Bank v. Petty, supra note 86.

[88]Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935), (permission granted): Indianola Cotton Oil Co. v. Crowley, 121 Miss. 62, 83 So. 409 (1920) (permission denied).

ute[89] the venue objection may be raised in the answer.[90]

A motion to quash the process is not such a general appearance as to constitute a waiver of an application thereafter filed for change of venue. By such a motion the defendant does not waive any question of jurisdiction over either the subject matter of the suit or the venue of the action.[91] Likewise a plea challenging the jurisdiction generally is not a waiver of the venue objection.[92] On the other hand, a general demurrer is equivalent to a plea to the merits and amounts to a waiver of venue.[93]

A waiver may result from the assumption of an inconsistsent position. Thus, where a defendant pleads that an accident was due to the negligence of the local co-defendant, an objection to venue on the ground that the plaintiff's proof failed to involve local co-defendant is not well taken and will be overruled on the theory of judicial estoppel.[93a]

However, the circuit court may not be put in error for sustaining a venue objection filed after a general demurrer or a plea to the merits unless the waiver point is raised in that court. The matter of waiver will not be considered when raised for the first time on appeal.[94]

When an objection to venue is duly raised, the point is not waived by pleading to the merits or going to trial after the venue plea is overruled, and the objection may be effectively interposed during or at the end of the trial or whenever the condition which makes the right apparent arises.[95] Thus, when the defendant on objection to the venue fails to sustain the burden, on the venue hearing, of showing improper joinder of a local co-defendant, the objection may be effectively reasserted if, on the trial, the invalidity of the joinder becomes apparent.[96]

Other phases of procedure will be discussed in connection with the subject of joinder of co-defendant for venue purposes.

E. Validity of Joinder

In order to forestall dismissal or change of venue on the plea on motion of one not subject to the venue of the court, a local co-defendant

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[89]Miss. Code Ann. § 1475-51 (1942).

[90]Brashier v. O'Connor, 181 Miss. 872, 180 So. 67 (1938) (a suit in chancery).

[91]Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931).

[92]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937), and cases cited.

[93]Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 103 (1935).

[93a]Great Southern Box Company v. Barrett, 94 So.2d 912 (Miss. 1957).

[94]Ibid.

[95]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281(1917).

[96]Howard v. Ware, supra note 95; Cf. Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931). The objection to venue must be specific and should be accompanied by a motion to transfer to the proper venue. The court cannot dismiss the suit (Miss. Code Ann. § 1441 (1942)) and cannot transfer it absent an objection to venue. A motion for a directed verdict is not a proper objection to venue. King v. Ainsworth, 83 So.2d 97 (Miss., 1955).

or a co-defendant against whom venue can be sustained must be joined in the suit.

The stated requirement contemplates that the venue-defendant be a material party and that joint liability is made apparent.[97] The first requirement is that the declaration state a joint cause of action[98] and that process be served, and that as to such defendant the court acquire territorial jurisdiction.[99] If the alleged cause of action is several and not joint, the requirement is not met.[100]

The allegations of the declaration are prima facie true and there is a prima facie presumption of good faith which attaches thereto,[101] but the declaration is not conclusive.[102]

It is said that the right of the plaintiff to select the forum in a proper proceeding is a valuable right[103] and where a choice is lawfully exercised the right of election may not be denied. On the other hand, the venue rights of a defendant are equally valuable and not merely technical.[104]

The local defendant must be a material party. Moreover, he must be a proper party. It has been said that he must not be joined for the sole purpose of venue, but this statement is limited in application to those instances where, in effect, the joinder is not in good faith, as where fraud, connivance or improper device is utilized in finding the defendant in the county or liability is asserted against such defendant without cause.

In many respects the test as to a proper joinder of a local or venue-defendant seems to rest upon the good or bad faith of the assertion of a joint cause of action. If the plaintiff, in good faith, asserts a joint cause of action and follows through with an attempt, in good faith, to prove it, the joinder is not improper, for venue purposes, merely because the proof is insufficient to hold the local defendant liable as a matter of law.

Thus, when a directed verdict results as to the local defendant, the co-defendant may or may not be entitled to a change of venue, depend-

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[97]Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930).

[98]Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1916).

[99]Cook v. Pitts, 114 Miss. 46, 74 So. 777 (1917); Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 104 (1935).

[100]Bergen v. Smith, 163 Miss. 797, 141 So. 760 (1937).

[101]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931).

[102]See note 101 supra; see also Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945).

[103]Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

[104]Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

ing upon the good faith of the plaintiff at the outset, determined in the light of the developments on the trial. A directed verdict does not destroy the venue when the validity of the joinder depends upon an unsettled question of law on which there is a conflict of authority.[105] Also, where a reasonable effort is made from the factual viewpoint to prove liability, venue is not lost by a directed verdict in favor of the local defendant.[106]

But when the joinder is had after a promise or agreement on behalf of the plaintiff to hold the local defendant harmless, as by a promise or agreement that he not be "hurt" as a result of the suit, the joinder is invalid and will not support venue.[107] The same result has been reached where the venue defendant is "found" by fraud or improper device.[108]

There is no indication in the authorities that venue is lost merely because the local defendant may be judgment proof or because the plaintiff intends to collect exclusively from the non-local defendant, unless the intention is manifested by promise or agreement on the part of the plaintiff, in effect, to hold the local defendant harmless. There may be other sufficient reasons for the joinder which are consistent with good faith, such as a desire to call the local defendant as an adverse witness or the fear that the theory of respondeat superior may not be maintainable in a tort action. Whatever the reason, the joinder is sufficient unless found to be in bad faith and solely for the purpose of venue.

But bad faith, in the strict sense, is not always controlling. Invalid joinder for venue purposes may extend to honest error. Thus, when it is shown clearly, as a matter of law, that the local defendant is not liable in the action[109] or when the plaintiff fails to attempt to prove liability as a matter of fact[110] the venue is lost, and this results without reference to the good faith in the strict or moral sense. Also, the fact that the trial court erroneously permits judgment to be entered jointly does not save the venue.[111]

105Weems v. Lee, 185 Miss. 98, 187 So. 531 (1939).

106Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Cox v. Dempsey, 177 Miss. 678, 171 So. 789 (1937); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

107McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940); Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

108Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937). In such cases the question is not so much a question of technical jurisdiction as it is the propriety of exercising a jurisdiction based upon fraud or improper device. The court may retain jurisdiction of the party so "found" and dismiss as to co-defendants. See also McRae v. Ashland Plantation Co., supra note 107; Great Southern Box Co. v. Barrett, 94 So.2d 912 (Miss. 1957).

109Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945), citing Howard v. Ware, 192 Miss. 36, 3 So.2d 830, 140 A.L.R. 1248 (1941), and distinguishing Weems v. Lee, 185 Miss. 98, 187 So. 531 (1939); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950).

110Cf. Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Howard v. Ware, supra note 109.

111Cox v. Dempsey, 179 Miss. 678, 171 So. 789 (1937).

Another requirement to effective joinder is the service of process upon the defendant on whom venue depends. On dismissal of such defendant for failure of process, venue is lost.[112] On the other hand, when a local defendant, properly joined, is served with process and the non-local defendants suffer judgment by default, the plaintiff may dismiss as to the local defendant without loss of venue.[113]

F. Procedure for Attacking Venue for Invalid Joinder

There remains for discussion the procedure for attacking the question of venue on the issue of the validity of joinder. From a comparison of the decisions dealing with this subject, the rules may be summarized as stated below.

If the declaration states no cause of action against the local defendant or if the declaration shows on its face that he is not a material party or that his alleged liability is separate and not joint, the objection must be sustained.[114] In such cases the objection should be made promptly and in any event before the jury is impaneled, and regard should be had for the rules of waiver by pleading generally without reserving the venue objection.

If, on the other hand, the declaration is in all respects sufficient on its face, it is prima facie correct but not conclusive,[115] and the venue objection must be sustained if and when it appears that the plaintiff actually has no cause of action against the local defendant and he was improperly joined for the sole purpose of conferring venue. In such cases, the objecting defendant may attack the declaration preliminarily and by plea in abatement or motion, in which proceeding the movant has the burden of proof,[116] or he may object to the venue whenever the condition therefor arises, as where the plaintiff, having properly alleged a cause of action, rests his case without making any attempt to prove liability.

The right to object when the condition arises is not lost by having objected preliminarily and having failed to meet the burden of proof on the prelminary hearing, and the fact that the trial court erroneously

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[112]Perry v. Nolan & Maris, 159 Miss. 387, 131 So. 252 (1930); Estes v. Bank of Walnut Grove, 114 Miss. 46, 74 So. 777 (1935), and cases cited; Wooley v. Brown, 41 Miss. 552 (1867).

[113]Reed v. Renaud, 14 Miss. 79 (1840). It was reasoned that the court having once acquired jurisdiction did not lose it by any subsequent change of circumstances such as appear in this case.

[114]Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1916); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950).

[115]Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Long v. Patterson, 198 Miss. 552, 22 So.2d 490 (1945); Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941).

[116]Gasquet v. Fisher, 15 Miss. 313 (1846); Trolio v. Nichols, supra note 115; McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940); Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344, 148 A. L. R. 469 (1943); Howard v. Ware, supra note 115.

enters a joint judgment will not serve to sustain the venue.[117]

Where the non-local defendant has reason to believe that the joinder is not in good faith, the better practice would be to expressly deny the pertinent allegation of the declaration and to expressly reserve all objections to venue. Under our recent pleading statute[118] this may be included in the answer, and it will serve to exclude any contention that the point was waived.[119]

It is noted that while the objection to venue may be asserted when the condition therefor arises and while this is a valuable right, it is still a personal privilege and not fundamentally jurisdictional. Therefore, objection should be made at the first opportunity, which is the time when the objecting defendant is apprised of the conditions on which venue may be attacked. Here diligence is required to forestall the finding of waiver. If the plaintiff, because of his bad faith, is not entitled to consideration in this respect, the public has an interest in the avoidance of the expense of abortive trials.[120]

G. Household and Residence—Defined

In order that an individual shall have the right of removal, he must be a citizen of this state and a resident of the state, and so it has been held that a traveling salesman who has no established home or fixed place of residence has no right of removal to a place where he frequently stays.[121]

The statute uses the terms "household and residence." Persons who dwell together as a family constitutes a "household," and a householder is one who has a family whom he keeps together and provides for and of which he is the head and master.[122] Residence is the equivalent of "domicile" and is synonymous therewith. A domicile is a "legal residence."[123] In applying the venue statute, however, the phrase "household and residence" has been considered in the sense of a legal residence

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[117]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941).

[118]Miss. Code Ann. § 1475.5 (1942).

[119]Technically, the issue may be raised preliminarily by plea or by motion or by both. Long v. Patterson, supra note 115. But by inclusion of the plea in the answer, followed by a motion for preliminary hearing, the defendant will preserve the point and at the same time give the trial court the option of hearing the matter preliminarily or of remanding the issue for determination on the trial, thus avoiding possible abuse of the procedure and trial of factual issues in piecemeal. Cf. Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469 (1943).

[120]Long v. Patterson, supra note 119, wherein the court recognized the rule that venue may be changed whenever the condition therefore arises, but commented that "this is particularly true when the conditions have been clearly disclosed in limine as here." Cf. Forman v. Miss. Publisher's Corp., supra note 119, for warning as to possible abuse of the procedure where it is sought to thresh out the merits of a plaintiff's case by piecemeal.

[121]Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943).

[122]Buckley v. Porter, 160 Miss. 98, 133 So. 215 (1931).

[123]Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

or domicile, and the technical definition of a "household" has been disregarded.[124]

What then is a legal domicile or residence? It is said that one resides where he has a settled abode for a time, for business or other purposes, although he may intend at some future time to move to another place.[125] However, temporary residence in one county for business purposes may be consistent with a legal domicile elsewhere.[126]

A domicile once established is presumed to continue and the burden of proving the contrary is upon the party alleging it. To show a change and rebut the presumption, it must be demonstrated that the apparent change was not only voluntary but that it was the intent of the person to remain at the new abode without intention of returning to the former domicile, and mere lapse of time does not alone constitute an abandonment within the rule.[127]

VII. LITIGANTS EXCLUDED

Governmental agencies in corporate form which are subject to suit are not specifically mentioned in venue statutes, but by reference to the common law, it has been held that a municipal corporation may be sued only in the county where it is located and that the jurisdiction may not be maintained elsewhere by joinder of local defendants or defendants jointly liable and subject to suit in some other county.[128]

VIII. LOCAL ACTIONS

The discussion heretofore has been related to personal or transitory actions. Local actions fall in a different category. These, according to the venue statute, consist of actions of trespass on land, of ejectment, and for the wrongful cutting of trees. Such actions "shall" be brought in the county where the land, or some part thereof, is situated, except that if the land lies in two or more counties and the defendant resides in either, the action "shall" be brought in the county of his residence.[129]

This provision is mandatory and involves the court's jurisdiction over the subject matter. Where such jurisdiction is absent it cannot be waived or conferred by consent of the parties.[130] These are the only

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[124]see e.g., Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920).

[125]Buckley v. Porter, 160 Miss. 98, 133 So. 215 (1931); Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

[126]Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

[127]Ibid.

[128]Jackson v. Wallace, 189 Miss. 252, 196 So. 223 (1940); see also State ex rel. Cowan v. State Highway Comm., 195 Miss. 657, 13 So.2d 614 (1943), dealing with a suit against a state corporation.

[129]Kraus v. Stewart, 122 Miss. 503, 84 So. 463 (1920); Jefferson Davis County v. Riley, 158 Miss. 473, 129 So. 324 (1930); *aff'd.* 130 So. 283 (1930); Cf. Bassett v. Stringer, 216 Miss. 766, 63 So.2d 234 (1953).

[130]Wilkinson v. Jenkins, 77 Miss. 603, 27 So. 611 (1900).

ordinary actions which can be brought in a county where the defendant is not found physically or by reason of statutory provisions.[131] In rem actions are also excluded.[132]

IX. RELATED VENUE STATUTES

Special statutes apply to various litigants and from these it is to be determined where such litigants may be found for venue purposes.

For example, railroad, express, steamboat, power, telegraph, telephone and transportation corporations and their operators may be found for venue purposes in any county in which the line or route may be.[133]

Insurance companies may be found in any county in which the loss may occur and life insurance companies may be found wherever the beneficiary resides. They may also be found in the county of the corporate domicile.[134]

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[131]Elder v. Hilzheim, 35 Miss. 231 (1858); Archibald v. Miss. U. T. R. Co., 66 Miss. 424, 6 So. 238 (1889).

[132]Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534 (1928).

[133]Miss Code Ann. § 1434 (1942).

[134]Miss. Code Ann. § 1435 (1942).

THE FORM AND CONTENT OF PLEADINGS

*Offa Lunsford Casey**

GENERAL DISCUSSION

With no apologies for brevity, an article on the *Form And Content Of Pleadings* when limited to the high points of the declaration and the answer in the circuit court does not adequately cover such a sweeping subject.[1] Generally, the subject may be covered by quoting the Latin axiom used in *Coke on Littleton,* Nihil simul inventum est et perfectum. It is repeated on the title page of *Chitty on Pleadings,*[2] and is still applicable today. Slowly and arduously we seek to improve our system of pleading. However, in our Mississippi practice we are still far away from attaining perfection. Nevertheless, in this state the strictness of common law pleadings has long since been liberalized, as far as form is concerned, by an act of legislation.[3] The Mississippi Supreme Court has broadly interpreted the statute relating to declarations.[4] In another decision it was held that what applies to the declaration likewise applies to its amendments.[5] However liberal our statutes concerning the form of pleadings may seem, in actual practice we have maintained practically the same type forms in different proceedings for many years. Furthermore, upon examination, these forms will be found not to differ too greatly from those set up as model forms in the old textbooks on pleadings used in the early days of the Mississippi practice. Specific forms are still prescribed and are adhered to even to the point of ritualism in those types of proceedings that are regulated by special statutes. As an example, legislation enacted into the Code governing ejectment have been construed as indicating the extent to which the recession from common law should be conceded. In a recent case the Mississippi Supreme Court held that the legislature retained all the

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[1]If this article was prepared in words appropriate under common law pleadings, this footnote would read as follows: "Though the author desires to fully discuss all matters of form and content of pleading, of necessity and due to the exigencies of the occasion and the supreme length of court dockets, this article is limited in scope to those problems relating to the declaration and answer in civil cases, excluding all criminal matters and civil proceedings which must meet the requirements of special statutes, and is further limited to a rather random choice of points not to be taken as indicating a particular precedence in importance."

However, since the article is prepared in the light of present day tendencies in pleading the footnote most properly reads: "This article is extremely limited in scope."

[2]Chitty on Pleadings (1851).

[3]Miss. Code Ann. § 1464 (1942). The sources of this act indicate its adoption as early as Hutchinson's Code (1848). See also §§ 1475.5, 1500, 1501, 1502.

[4]Evans v. Miller, 58 Miss. 120 (1880); Southeastern Express Co. v. Namie, 182 Miss. 447, 181 So. 515 (1938).

[5]Federal Compress Co. v. Craig, 192 Miss. 689, 7 So.2d 523 (1942).

requirements of common law not specifically dispensed with.[6] The opinion traces the statutory authority back to the Code of 1857 and states that today the entire chapter governing the form of this procedure is almost completely the same as that enacted 90 years ago.[7] Apparently the earlier attempt made by the Legislature in 1850 to dispense with precise formal proceedings construed to be applicable to proceedings in ejectment[8] was not favorably received by the practicing bar, or at least by those charged with drafing the Code of 1857. In those days, as today, there was opposition to simplicity and brevity or progressive change, because the Code of 1857 was enacted with the old archaic ejectment proceedings and these same proceedings are continued in each of the various Codes down to the present time.[9] The Supreme Court indicated progress was needed, but, nevertheless, held that the form of the proceedings bound the user to its limitations.

The form and content of pleadings are prescribed to a certain extent by statute in certain types of cases. These include actions of unlawful entry and detainer,[10] trial of the rights of personal property levied on under execution,[11] salvage claims,[12] actions between landlord and tenant with reference to attachment or distress for rent due or supplies furnished,[13] mandamus, prohibition and quo warranto,[14] attachment against depositors at law[15] and replevin.[16]

From lawyers and laymen alike, the criticism is sometimes voiced that legal procedure is bound too tightly by archaic forms and that this contributes to delay and to decisions that are not based on the merits of the case. Without wholly disputing this, the fact remains that all pleadings, of necessity, must have a manner and form of answering the complaint. Thus, there is a need for some prescription as to form and content in order to insure that justice between the parties will be speedily secured. Otherwise, liberality in pleading may produce chaotic results.

THE FORM OF PLEADING

A. Declaration

In Mississippi practice the form used to state a cause of action is a

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[6]Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947).
[7]Ibid.
[8]Cooper v. Benson, 28 Miss. 766 (1855).
[9]Miss. Code Ann. c. 1 (1942).
[10]Miss. Code Ann. §§ 1033-1058 (1942).
[11]Miss. Code Ann. §§ 1020-1032 (1942).
[12]Miss. Code Ann. §§ 1007-1020 (1942).
[13]Miss. Code Ann. §§ 897-956 (1942).
[14]Miss. Code Ann. §§ 1109-1145 (1942).
[15]Miss. Code Ann. §§ 2675-2728 (1942).
[16]Miss. Code Ann. §§ 2841-2869 (1942).

declaration.[17] By comparison, in Federal practice under the new rules instituted some twenty years ago, it is called a complaint,[18] and is required to be designated by name.[19] An examination of the Federal Rules of Civil Procedure and our own statute on declarations shows that under Mississippi practice the plaintiff, except in specific actions, is far less bound to any specific form than the complainants under the Federal Rules, although the latter are considered by many to be a model. Our statute leaves it wholly within the discretion of the pleader as to how he will set up his claim. On the other hand, the Federal rules, while not bound as to form in special actions[20] such as replevin and attachment, do specify an exact form for pleadings,[21] and to aid the pleader the Federal Rules have an Appendix of Forms. These are described as being inserted merely for illustration, but in reality are designed to meet the requirement of the Federal Rules—particular emphasis being placed on brevity and simplicity.[22] The point of simplicity and brevity is one that some attorneys fail to achieve in their Mississippi pleadings. Since the statute on declarations gives the plaintiff's attorney so much leeway in stating his case, there is a tendency to overstate it and thereby burden the court and the jury with "verbose verbiage." A remedy for this same complaint was once effectuated in English practice through the adoption of a court rule which taxed the offending attorneys with the cost incurred by their verboseness.[23]

While, as already noted, by legislative enactment no specific form of declaration is required in a suit in the circuit court,[24] yet even this broad statute contains some requisites as to form. Ordinary and concise language is required. The ordinary language used in Mississippi is English. Fortunately, we are not confronted with the problem of some of our more enlightened "melting pot" states where large minority groups cannot even understand English.[25]

In Section 1464 of the Code of 1942 the word *concise* modifies *langu-*

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[17]Miss. Code Ann. § 1464 (1942).

[18]Fed. R. Civ. P. 7(a).

[19]Fed. R. Civ. P. 10(a).

[20]Fed. R. Civ. P. 64.

[21]Fed. R. Civ. P. 8, 10 and 11.

[22]Fed. R. Civ. P. 84. Historically, English practitioners used the *Registrum Brevium* to secure model forms.

[23]The rule adopted subjected attorneys to a penalty if in declarations in assumpsit and debt the attorneys used words in excess of those prescribed by the forms attached to the rule in stating their case. Regula Generalis, Trinity Term. William IV, 1831, cited in 3 Chitty on Pleadings p. 1409 (1851).

[24]Miss. Code Ann. § 1464 (1942).

[25]In all the United States and the Territories, so far as ascertainable, pleadings may be stated in a language other than English only in Puerto Rico. There Spanish is used indiscriminately in the insular courts. However, if pleadings are in English it is customary to attach a Spanish translation. See Act of February 21, 1902; Act No. 15 of March 12, 1914, p. 145; Act. No. 8 of Nov. 12, 1919, p. 210, Puerto Rico Session Laws.

age and both words refer to the statement of facts. While the declaration needs to be factually complete, conciseness means briefly stating the facts necessary to show a cause of action without inserting grandiose phrases that are needlessly added and which are injected for the ears of the client and are intended as a grandstand play to the jury. Old common law pleading phrases should also be omitted.[26] An understandable statement of the case in logical sequence is of course highly desirable, but ineptness in the use of words is not held against the pleader in Mississippi.[27] At an early date our Appellate Court held that an expression in a declaration capable of different meanings will be interpreted in support of the declaration rather than to defeat it.[28]

By statutory requirement the declaration is styled with a heading that contains the name of the county in which the action is to be filed.[29] In practice, the name of the parties identified as plaintiff and defendant are also placed in the heading, together with the title of the pleading. In a few instances further identification of the parties has been given by stating the residence of both plaintiff and defendant in the heading, although generally this is a part of the body of the declaration. Such a heading is a part of the declaration and is noticed by the court.[30]

For many years all pleadings in the circuit court have been in writing.[31] In some instances to save time and for the sake of convenience, courts have permitted certain pleadings to be dictated into the record, but this is not a desirable practice since the stenographer's notes do not become a part of the clerk's file. There is one type of proceeding in which the requirement of written pleadings has been dispensed with by statute, although even there it is optional. This is the rare case of assessing the value of party walls.[32] However, in this type proceeding a written request is necessary to initiate the case before a magistrate. If it gets to the circuit court on appeal, no written pleadings are required. The apparent reason for this is that only one question is to be decided.

So far as the written form for the body of the declaration is concerned, separate paragraphs for the several divisible parts are in keeping with the intent of Section 1465. This not only produces easier reading and a more understandable document, but permits the separable facts to be separately answered in whole or in part, or allows admission or denial with better facility. Furthermore, it complies with the provisions of the statute governing answers.[33]

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[26]Miss. Code Ann. § 15 (1942).
[27]Brown v. Miss. Central R. Co., 144 Miss. 326, 109 So. 796, 798 (1926).
[28]Pender v. Dickens, 27 Miss. 252 (1854).
[29]Miss. Code Ann. § 1465 (1942).
[30]Hayes Produce Co. v. Taylor, 213 Miss. 217, 56 So.2d 503 (1952).
[31]See Bowman v. McLaughlin, 45 Miss. 461, 489 (1871).
[32]Miss. Code Ann. § 1005 (1942).
[33]Miss. Code Ann. § 1475.5, sub paragraph 2(a) (1942).

Under the common law it was necessary to state within the body of the declaration the form or type of action. Thus, in a negligence action against a common carrier for loss of goods, the first sentence of the declaration began as follows:[34]

> "C. C. Complains of D. D. Co., a corporation chartered by and doing business under the laws of the State of Mississippi, of a plea of trespass on the case in assumpsit; for this, to-wit, et cetera."

The declaration then concluded repetitiously with a final sentence apparently inserted to make certain that the court would have no misunderstanding as to the form of action, thus: "And therefore he institutes this action of trespass on the case in assumpsit." Almost one hundred years ago the Mississippi Supreme Court thought that the including of a statement of the form of action in the declaration was very important,[35] but not of sufficient importance to be fatal on general demurrer. An examination of cases filed in Jones County shows that as late as fifty years ago a few lawyers were still including in the declaration a reference to the form of action.[36]

The quaere raised in *Blackwell v. Reed*[37] was answered by the Supreme Court in a later decision which held that the character of a complaint or defense is determined by what it in fact is, and not what it is styled in tthe pleadings.[38] This decision was strengthened by the case of *Pierce v. Chapman*.[39] In that case the Court decided that a declaration against a member of a board of supervisors alleging a trespass by the cutting of trees on plaintiff's land was sufficient to permit recovery against the board member in his individual capacity, although the form of action was drawn to charge him in his official capacity—the decision stating that the form is not so essential as to avoid the substance of the declaration.[40]

A careful analysis of the facts in any case, and then a thorough study of the applicable law, both statutes and decisions, prior to the drafting of the declaration will, in most instances, obviate the necessity of the Supreme Court having to pass on such questions as arose in the above cited cases. Finally, all pleadings must be signed by the party or his attorney.[41] Where a declaration is filed without such a signature and the defendant is summoned, a motion to dismiss at the cost of the plain-

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[34]Gregory, Forms of Common Law Declarations, p. 33 (1906).
[35]Blackwell v. John Reed & Co., 41 Miss. 102 (1866).
[36]Circuit Clerk Files, 2nd District of Jones County, 1906 to 1912.
[37]41 Miss. 102 (1866).
[38]Green v. Bounds, 112 Miss. 252, 72 So. 1001 (1916).
[39]165 Miss. 749, 143 So. 845 (1932).
[40]But see Grissom v. General Contract Purchase Corporation, 191 Miss. 742, 4 So.2d 303 (1941). Of course replevin is governed by a special statute, but query: Is this not a step backward to a strict interpretation of the requirements of forms of action?
[41]Miss. Code Ann. § 1496 (1942).

tiff should be sustained because there is no suit pending under the circumstances.

Mississippi has an integrated bar,[42] and from time to time a few attorneys are suspended from membership and the right to practice law in the courts for non-payment of dues.[43] An interesting question will be presented if a pleading is challenged by a motion to strike on the grounds of having been signed by an attorney that has been suspended.[44]

B. Answer

The same liberality in form applicable to declarations is applicable to answers.[45] As long as the answer substantially meets the requirements of putting the case at issue, the form is not really material.[46] This was also the law prior to 1948 when the Legislature, on the recommendation of the Mississippi Bar Association, enacted into law the new statute which abolished pleas in the circuit court and which provided that every defense heretofore made by plea shall be made in an answer.[47] Prior to 1948 the form of pleas in abatement was prescribed to a certain extent by statute,[48] and the order of pleading defenses, which in effect is a matter of form, was regulated by statute to the extent of requiring the defendant to plead all abatement pleas first and have them disposed of before pleading in bar.[49] The luckless defendant who filed a plea of general issue and then discovered a matter in abatement could not then plead it,[50] and it was such bad form to join an abatement plea with a plea in bar[51] that it could result in a judgment for the plaintiff for want of proper pleading.[52] Of course it was logical to dispose of abatement matters first, but the refusal to permit pleas in bar and abatement to be filed at the same time resulted in needless delay and sometimes in injustice.

The purpose of discussing past history is to call attention to the fact that even where there are statutes and rules devised to simplify

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42Miss. Code Ann. §§ 8685-8724 (1942).

43Miss. Code Ann. §§ 8699-8710 (1942).

44cf. Martinez, 318 S.W. 2d, 66 (Tex. 1959). This decision held that a defendant in a murder case, convicted and sentenced to death, and who was represented by a court appointed attorney whose name had been removed from the state bar rolls for non-payment of dues, had been deprived of his right to have counsel because he was represented by a person who had no right to practice law.

45Miss. Code Ann. §§ 1475, 1501 (1942). An excellent article which should be read by every practitioner was written by the late Chief Justice V. A. Griffith entitled "The New Mississippi Civil Practice Act—Its Background and Effect." XX Miss. L. J. 1 (1948).

46Neely v. Allis-Chalmers Mfg. Co., 174 Miss. 519, 165 So. 114 (1936).

47Miss. Code Ann. § 1475.5 (1942).

48Miss. Code Ann. § 1476 (1942).

49Miss. Code Ann. §§ 1476-1478 (1942).

50Lewis v. State, 65 Miss. 468, 4 So. 429 (1888).

51Miss. Code Ann. § 1478 (1942).

52Rice v. Patterson, 92 Miss. 666, 42 So. 255 (1908).

pleadings as to form so that the real object of a lawsuit may be more quickly attained, the Bar Association must always be on the alert to prevent a relapse to the technical form of pleadings. This apparently happened in our Mississippi Practice for the original source of Sections 1475 through 1477 of the Code of 1942 appears to be Hutchinson's Code of 1848. In 1850 the legislature simplified pleadings and abolished all common law forms. However, in 1857 when a new Code was enacted we went back to the more technical pleading, and Section 1478 was added. This section was a pleader's stumbling block, and permitted and required a much more formal type of pleading than had been contemplated in 1848 and 1850. As Justice Griffith points out, it took nearly one hundred years to recover what we gained in 1850, but lost in 1857.[53]

Section 1475.5 is a short but comprehensive statute—the first three subsections of which are based largely on chancery practice. Sub-section 1 is comparable to Section 1290 of the Code of 1942. Sub-section 2 is almost verbatim with Section 1291. Sub-section 3 is the same as Section 1300 except for its first sentence. Sub-section 4 is a paraphrase of Section 1480.

Sub-section 1 of Section 1475.5 abolishes all pleas in the circuit court so far as trials or form are concerned. Any matter that was formerly brought forth by a plea now is simply set forth in the answer, whether it be in abatement or in bar.

Abatement defenses should be stated in separate numbered paragraphs in the first part of the answer to facilitate the disposition of those pleas. Then the answer to the several paragraphs of the declaration should follow, and, finally, any affirmative defenses should be set out and so designated. In at least one type of special action, attachment against debtors, it has been held that the provision of this statute governing answers supersedes Sections 2713 and 2716 requiring pleas in abatement to be filed and disposed of before filing any pleading to the merits.[54]

Subsequently, the Supreme Court appears to have broadened this interpretation so as to construe Section 1475.5 as having supplanted every other section of the Code dealing with pleas in abatement, and also the common law rules governing such pleas.[55] As to whether demurrers may be filed separately or should be included with the answer and heard before going to trial on the merits requires an examination of

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[53]Griffith, The New Civil Practice Act—Its Background and Effect, XX Miss. L. J. 1 (1948).

[54]Christopher v. Brown, 211 Miss. 322, 51 So.2d 579 (1951). The decision in this case is an important one so far as the form of answers is concerned since it holds that Section 1475.5 is applicable to at least one type of special action. In light of this holding there appears to be no good reason why Section 1475.5 may not be extended to other special actions.

[55]Home Insurance Co. v. Watts, 229 Miss. 735, 91 So.2d 722, 727 (1957).

several sections of the Code. Section 1475.5 does not expressly repeal Sections 1490, 1491, 1492, or 1493 of the Code of 1942, the statutes concerning demurrers. Since repeals by implication are not favored under the rules of statutory construction, and since a demurrer is a form of pleading specified in Section 1519 of the Code of 1942, the only conclusion that may be reached is that a demurrer may be filed and heard separately. Special demurrers have been abolished,[56] and since a general demurrer to the declaration must be on the grounds of no cause of action having been stated[57] and in view of Section 1491 which provides that if the demurrer to the declaration be overruled judgment must be given for the plaintiff for the amount due and interest,[58] the form of pleading here becomes very important. It will not only simplify the pleadings and prevent delay in the trial, but will also prevent a judgment quod recuperet if the demurrer is incorporated in the answer, provided a good and substantial defense is also fully set forth in the answer at the time of filing. If a general demurrer is separately filed and overruled, then, under the statute, the defendant must show by affidavit that he has a good defense and detail it so that the court may consider whether to then let him file an answer. In most instances of this type the time consumed in the separate filing and hearing of demurrers could be better utilized by the attorney.

CONTENT OF PLEADINGS

A. Declaration

After the styling of the declaration, which includes the designation of the county and court in which the suit is to be filed,[59] together with the names of the parties sued,[60] "the body or statement of the cause of action follows in natural order, and which in every description of action consists of three different points, viz: the right, whether founded upon contract, or tort independent of contract; the injury to such right; and the consequent damages."[61] Or, as our statute states: "A statement of the facts constituting the cause of action."[62]

It is basic that in a declaration only facts should be alleged. But the facts should be sufficient to inform the court so that the judge may determine the applicable law in the case, and sufficient to give the de-

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[56]Miss. Code Ann. § 1497 (1942).

[57]Aetna Insurance Co. v. Commander, 169 Miss. 847, 153 So. 877 (1934).

[58]This Section applies to actions in both tort and contract. Feazell v. Soltzfus, 98 Miss. 886, 54 So. 44 (1911).

[59]Miss. Code Ann. § 1465 (1942).

[60]For action to be taken where defendants are unknown see Miss. Code Ann. § 1466 (1942).

[61]Chitty on Pleadings 287 (1851).

[62]Miss. Code Ann. § 1464 (1942).

fendant notice of what is meant to be proved[63] so that he may have an opportunity to answer it appropriately.

Consequently, arguments,[64] conclusions[65] and matters of law are not properly a part of the declaration and are subject to be stricken on motion.[66]

The pleader is not expected nor required to detail the declaration to such a fine point that every item of evidence is set forth. Only the ultimate facts are essential and the testimony may give the details to establish such facts.[67] Certain facts are matters of common knowledge and may be judicially noticed by the courts. It is not necessary to plead such facts. Conversely, an attempt to plead ignorance of such facts will not aid the pleading in establishing a cause of action.[68]

In actions where such are necessary to disclose the true basis of the case, exhibits are required to be filed with the declaration.[69] Although the Code sections requiring these exhibits are said to announce rules of evidence and not rules of pleading,[70] if these exhibits are filed they become a part of the declaration; they are binding on the pleader and are controlling in the event of a conflict between the exhibit and the declaration.[71] Even though Sections 1469 and 1470 are construed to be mere rules of evidence, if the action is founded on a writing which should be exhibited, a declaration which does not itself contain sufficient allegations to set forth the claim, and merely refers to the exhibit, will not support a judgment by default when the exhibit is not attached.[72] In such instances the exhibit becomes a vital part of the pleading and the case is not fully stated unless it is attached. It appears that it would be better practice to at least give a summary of the exhibit in the declaration unless the nature of the document makes it impractical to do so. In the latter event, the attorney should make certain that the exhibit is attached when it is handed to the clerk for filing.

Where a suit is brought in tort for personal injury with only a general claim for damages, it has been held that it is not error to admit evidence of hospital and doctor bills necessarily incurred as a result of the injury even though such bills were not specifically claimed nor ex-

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[63]New York Indemnity Co. v. Myers, 161 Miss. 784, 138 So. 334 (1931); City of Jackson v. Cook, 214 Miss. 201, 58 So.2d 498 (1952).

[64]Stirling v. Logue, 154 Miss. 812, 123 So. 825, 828 (1929).

[65]Merchants & Farmers Bank v. Bank of Winona, 106 Miss. 471, 64 So. 210 (1914); Horton v. Lincoln County, 116 Miss. 813, 77 So. 796 (1918).

[66]Miss. Code Ann. § 1498 (1942): Supreme Ruling of F. M. P. v. Turner, 105 Miss. 468, 62 So. 497 (1913).

[67]Bennett v. Hardwell, 214 Miss. 390, 59 So.2d 82 (1952).

[68]Newell Contracting Co. v. Flynt, 172 Miss. 719, 161 So. 298 (1935).

[69]Miss. Code Ann. §§ 1469, 1470 (1942).

[70]Western Casualty & Surety Co. v. Fox-Everett, Inc., 223 Miss. 388, 78 So.2d 363 (1955), holding failure to attach does not prevent judgment being taken.

[71]Montgomery v. Hanover Bank, 79 Miss. 443, 30 So. 635 (1901).

[72]Motors Insurance Co. v. Holland, 229 Miss. 262, 90 So.2d 392 (1956).

hibited with the declaration on the theory that the defendant should have asked for a bill of particulars of the injury.[73] This holding is difficult to rationalize in view of the statute and in view of a contrary holding not specifically reversed in *Chapman v. Powers.*[74] The decision in *Currie and Turner Construction Co. v. Bryan,* has resulted in numerous filing of motions for bills of particular which are automatically granted. This sometimes results in a delay in the trial. Thus it would appear that it is to plaintiff's advantage, where there is a claim for special damages of this type, to set them out fully with the exhibits attached in the original declaration. By so doing he will prevent his own trial from being delayed on this ground. It may be observed that this is the type of conflict in court rulings that our Appellate Court should settle at the earliest opportunity.

While it may be considered under either the form or the content of the declaration, a consideration of joinder of causes in one declaration seems more appropriately a part of the substance of the pleadings. The general rule appears to be that although the statute governing declarations is broadly construed, it does not go so far as to permit a *misjoinder* of causes of action. So it has been held that a declaration containing one count in contract and one sounding in tort is a misjoinder of causes of action, and a general demurrer thereto is properly sustained.[75] However, if a general demurrer is not interposed it appears that the case will not be reversed on the ground of misjoinder even though the declaration may be considered improper.[76] And even if independent causes of action are joined in the same count, if they are joined because they concurrently lead to one claim for damages, it is not considered to be a misjoinder.[77] Notwithstanding *Hazelhurst v. Cumberland Tel. and Tel. Co.,* on re-examination, Section 1464 does not indicate that it was drafted to keep in effect the old common law rules of pleading with regard to misjoinder where separate counts are used. This appears especially true in view of Sections 1513, 1516, 1549 and 1550 of the Code of 1942. The more logical rules appear to have been cast aside when the Court in deciding *Hazelhurst v. Cumberland Tel. and Tel. Co.* ignored its ruling in *Miller v. Wesson.*[78] Of course, this is not to say that separate counts should be permitted to be pled where the recovery would be a duplication of damages. An example is a suit on a contract for goods furnished pursuant thereto in one count, and a suit in quantum meruit for the

[73]Currie & Turner Construction Co. v. Bryan, 184 Miss. 44, 185 So. 256 (1939).

[74]150 Miss. 687, 116 So. 609 (1928).

[75]Hazelhurst v. Cumberland Tel. & Tel. Co., 83 Miss. 303, 35 So. 951 (1903). See G. M. & O. R. R. Co. v. Madden, 190 Miss 374, 200 So. 119 (1941). Later pronouncements of this rule were made in Nasif v. Booth, 221 Miss. 126, 72 So.2d 440 (1954); Stringer v. Consumers Credit Corp., 105 So.2d 756 (Miss. 1958).

[76]Simonton v. Moore, 204 Miss. 760, 38 So.2d 94 (1948).

[77]City of Meridian v. Sullivan, 209 Miss. 61, 45 So.2d 851 (1950).

[78]58 Miss. 831 (1881).

same goods in another count.[79]

The law presumes damages from the infringement of a legal right,[80] and in general damage claims for money it is not necessary to plead an exact amount.[81] Necessarily, the plaintiff should set forth in the declaration the various elements of damage for which claim is made, and although each element of the damage recoverable may not have to be specially pled,[82] all claims of injury should be set forth fully so far as it is possible to do so without pleading the evidence.[83] Special damages are generally required to be specially pled.[84]

Other than the statutes governing special actions, there are a few statutes requiring specific matters to be alleged in the declaration in particular cases.[85] In many cases the requisites of the declaration may depend partly on some statute. A close examination of the pertinent statutes and the decisions construing them will be necessary before drafting and filing the declaration. While the facts and circumstances necessary to support the action must be fully set forth certainty and accuracy are of utmost importance to proper drafting of the pleadings and their successful utilization. A case may be won in the courtroom, but the groundwork for the victory was long before laid in the tedious investsigation to correctly determine the law and the facts.

B. Answer

Since the abolishment of all pleas in the circuit court, every available defense may be pled in the answer.[86]

Sub-section 1 of Section 1475.5 provides a means of setting up pleas which go to the entire present cause of action so that they may be separately heard and disposed of before the principal trial on the merits. Any such matter should be placed in the answer, as stated in the act, "in such manner as to be clearly distinct and readily separable." While this po-

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79Carter v. Collins, 151 Miss. 1, 117 So. 336 (1928).

80Doherty v. Miss. Power Co., 178 Miss. 204, 173 So. 287 (1937).

81Henry v. Shepherd, 52 Miss. 125 (1876).

82Following are some instances of damages not required to be specially pled: (Impairment of earning capacity), Miss. Cent. R. v. Smith, 176 Miss. 306, 168 So. 604 (1936), *cert. den.* 299 U. S. 518 (1936); (Inconvenience), Critz v. So. Bell Tel. & Tel. Co., 178 Miss. 323, 173 So. 430 (1937); (Punitive), Laurel Equipment Co. v. Matthews, 218 Miss. 718, 67 So.2d 258 (1953); (Damages as may be presumed necessary to result from a breach of contract), Vicksburg & Miss. R. R. Co. v. Ragsdale, 46 Miss. 458 (1872): See also Miss. Code Ann. § 1453 (1942).

83Although held sufficient without a bill of particulars having been requested, for a case in which the damages were too generally set forth, see Gulf Research Development Co. v. Linder, 177 Miss. 123, 170 So. 646 (1936). Then compare with Pigford v. House, 149 Miss. 692, 115 So. 774 (1928).

84Vicksburg & Miss. R. R. Co. v. Ragsdale, 46 Miss. 458 (1872).

85Miss Code Ann. § 1471 (1942), governing declarations on bonds with a condition; Miss. Code Ann. § 1472 (1942), requiring a description of the land in actions of trespass to land; Miss. Code Ann. § 1473 (1942), concerning declarations for libel or slander.

86Miss. Code Ann. § 1475.5, sub section 1 (1942).

sition in the answer may be a matter of form, it is important, if the defendant desires to move for a separate hearing on such matter, for its substance to be separable from the answer to the allegations of the declaration.

Inconsistent defenses are permissible whether heretofore presented by plea in abatement or in bar. Where inconsistent defenses are pleaded, neither may be construed as a waiver of the other, nor may one be used as an admission to destroy the other.[87]

Although Section 1475.5 appears to permit all types of defenses, inconsistent or otherwise, the Legislature left Sections 1479 through 1485 of the Code of 1942 in effect, all of which relate to defensive pleading. Later, in 1952, Section 1483.5 relating to counter-claims was added. The result is that the applicable sections not only must be read together with Section 1475.5, but the decisions thereunder must be carefully studied before drafting an answer. For example, under Section 1481, "Where a mutual indebtedness exists between plaintiff and defendant, the defendant may plead and set off . . . ." The interpretation of Section 1481 is that a set-off may only be pleaded where the suit arises by contract and the amount claimed is certain.[88] In 1950, tort claims arising out of the same transaction could not be set off by the defendant against the plaintiff's tort claims,[89] but the legislature by adding Section 1483.5 enabled counterclaims arising out of or connected with the action in either tort or contract, whether liquidated or unliquidated, to be filed with the answer.[90] A further re-examination of Section 1475.5 by our Appellate Court may result in a more liberal interpretation as to what is meant by paragraph 1 wherein all pleas are abolished and all defenses heretofore presented by plea are permitted to be made in the answer, whether consistent or not. This statute appears to be broad enough to permit any claims a defendant may have against a plaintiff to be adjudicated in the same suit with plaintiff's claim.

While the intention of the legislature is plainly set forth in Section 1475.5, the question as to how far this section affects special actions has not yet been finally determined by the Supreme Court. An opportunity to pass on whether this Section abolishes pleas of not guilty in replevin actions was partially by-passed by the court in *McCaskill v. Little*.[91] In view of this action by the Appellate Court, the safest procedure in special

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[87]Morris v. Henderson, 37 Miss. 492 (1859). This decision was rendered in a case which was brought under the pleading act of 1850. A reading of the opinion will show the close similarity of Section 1475.5 to the pleading act of 1850.

[88]Lancaster v. Jordan Auto Co., 185 Miss. 530, 187 So. 535 (1939).

[89]Vines v. Perry, 208 Miss. 869, 45 So.2d 734 (1950).

[90]See City of Oxford v. Spears, 228 Miss. 433, 87 So.2d 914 (1956).

[91]214 Miss. 331. 58 So.2d 801 (1952); cf. Home Insurance Co. v. Watts, 229 Miss. 735, So.2d 722 (1957), *suggestion of error sustained on other grounds,* 93 So.2d 848 (Miss. 1957).

actions is to follow the old form set up in the Code because these sections were not specifically repealed by Section 1475.5.

Sub-section 2 of Section 1475.5 hardly needs discussion because it is plainly stated and not subject to misunderstanding. It does not need to be followed, and if the plaintiff drafts his declaration in a proper manner it will facilitate the answer by the defendant. The first sentence requires the defendant to answer fully all the allegations of the declaration,[92] ". . . without being specially interrogated." This latter procedure, permissible under Section 1714 of the Code of 1942, is generally seldom used by either side. However, where the answer fails to comply with the statute and is comparable to a plea of general issue, interrogatories may be used to "dig out" such knowledge as the defendant may have. Conversely, the same procedure may be used against a plaintiff where the allegations of the declaration are too general. The advantage of knowing to what each party will testify in advance sometimes eliminates the need for trial, and where there is a trial the use of interrogatories permits a more expeditious handling of the case.

Under Sub-section 2 the defendant must either admit in whole or in part, or deny in whole or in part each allegation of the declaration. Matters in confession and avoidance, of course, are affirmatively pled. Since this paragraph of the statute was taken from Section 1291 of the Code of 1942 governing chancery pleading, decisions construing that part of the Section will be applicable in circuit court. Thus, neither an evasive answer which does not deny the allegations of the declaration,[93] nor an answer not specifically denying the allegations of the declaration but which states that defendant had no personal knowledge thereof,[94] nor an answer stating defendant is not advised as to certain allegations of the declaration and demanding strict proof,[95] are sufficient to put plaintiff to proof of such allegations. As to the parts of the declaration not admitted, as stated by Justice Chalmers in *Mead v. Day*:[96]

> "The true meaning of the statute, we think is this: There must be a denial not necessarily of the facts, unless they are within the personal knowledge of the respondent, but of all knowledge, information and belief. Where knowledge and information are both denied it would, perhaps, be unnecessary to make any averment as to belief, since belief, without either information or knowledge, is necessarily worthless. Whenever the denial is not of this character—

92While not wholly applicable, because of the fact that Section 1475.5 is largely taken from our Code Sections governing chancery pleading, Griffith, Mississippi Chancery Practice, c. 15 (Answers) (1950), may be read and used to great advantage in circuit court pleading.

93Applewhite v. Foxworth, 79 Miss. 773, 31 So. 533 (1902).

94Hinton v. Mills, 120 Miss. 388, 82 So. 264 (1919).

96Jones County Land Co. v. Fox, 120 Miss. 798, 83 So. 241 (1919).

9654 Miss. 58, 63 (1876).

that is to say, whenever there is an omission to deny the facts and a failure to negative both knowledge and information in relation to time - - the complainant, instead of being forced to resort to his exceptions may treat the allegations of the bill as admitted."

Sub-section 4 of Section 1475.5 is Section 1480 of the Code of 1942 rewritten so as to comply with the new form of pleading of defenses in the answer. Since the plaintiff is required to respond to this affirmative matter, except where the original declaration anticipates such a plea and the matter is then at issue,[97] the affirmative defense should be separate from the several admissions or denials of the allegations of the declaration so that it can be easily recognized as an affirmative matter in avoidance. Decisions construing Section 1480 of the Code of 1942 are likewise applicable to Sub-section 4:

> "While as a rule great liberty is allowed in pleading and procedure, this statute is mandatory and must be strictly complied with. The effect of Section 686 (Code of 1892) is to require every affirmative matter to be pleaded specially or given notice of so as to distinctly inform the opposite party of the precise ground of contest on which he is to be met by his adversary."[98]

The penalty for failure to properly plead any affirmative defense which defendant may have will be a denial by the Court of its consideration in the trial, and the receiving of evidence and the granting of instructions thereon in spite of such failure to plead is reversible error.[99]

A part of the discussion of the content of an answer normally would be devoted to Section 1483.5 on the subject of counterclaims. However, that statute has been fully, comprehensively and most ably discussed in a recent article.[100] The inclusion of that article in any symposium on the circuit court would be most appropriate. Therefore, instead of trying to duplicate it in brief, reference is made to the article for any problems relating to the filing of counterclaims.

CONCLUSION

"The object of pleading is to state in concise form, and by positive averment, the facts constituting a cause of action and the facts constituting the excuse, justification or grounds of defense. This written controversy or altercation is continued until the parties come to some material matter, affirmed on the one side and denied on the other, fit to dispose of the suit on its merits."

97Anderson v. Laurel Oil & Fertilizer Co., 228 Miss. 95, 87 So.2d 556 (1956).

98M. B. R. Co. v. Grant, 86 Miss. 565, 38 So. 502 (1905), citing Tittle v. Bonner, 53 Miss. 578 (1876). And the pleading should show clearly the grounds upon which his defense rests, Simmons v. Chrysler, 197 Miss. 547, 20 So.2d 85 (1944).

99Ellis v. Hubbard, 27 Miss. 837, 87 So.2d 251 (1956). For converse, see Calvert Fire Ins. Co. v. Swain, 217 Miss. 773, 65 So.2d 253 (1953).

100Daniel, The Miss. Counter Claim Statute, XXV Miss. L. J. 252 (1954).

"At common law the canons of pleading were meant to guide and lead the parties to this result - - a material issue of law or fact. Our statutes have enlarged the power of the courts to extend to litigants a liberal helping hand to put their pleadings in such shape as that the real, true merits of complaint or defense may be brought out and presented for trial and adjudication."[101]

The reference by Justice Simrall to the power of the courts, "to extend to litigants a liberal helping hand" is about the limit of the court's authority, and, generally, this may be done only in term time unless both sides agree otherwise. The latter is the exception to the rule. Since the courts have surrenderd their authority to the legislature to make their rules for them, a change in legislation is sorely needed to give the court broader powers to deal with pleadings, with particular reference to pre-trial hearings and authority to act in vacation as in term time. Other progressive changes in judicial administration are needed, but are not pertinent to this discussion.

We have reached the era when, for the benefit of the legal profession, lawyers, generally, need to realize that their pleadings are not comic opera scripts where each side may try to best his adversary with absurdity. Declarations and answers should state factual truth and stay within the bounds of factual reality. Defendant's attorneys who deny everything when they know that at least a part of the facts are not in dispute are subject to criticism, but they are no more to blame for this type situation than the plaintiff's attorneys who claim extravagant injuries and damages, knowing all the time that their clients have not been so injured, and that a normal jury would not return any such verdict.

It is difficult to wipe from the public's mind the continued jokes and cynical stories about shyster lawyers when the type pleadings referred to are read in the hearing of layment and jurymen. They believe that law is what the lawyers make it, and sometimes justly conclude that if the pleadngs are not strictly honest neither is the man who prepares them.

Although neither the declaration nor the answer are sworn to, when signed by the attorney or signed at his direction after the pleadings are drafted by him, they are his affirmation that under his oath of office,[102] and under the Canon of Ethics of the Mississippi Bar Association[103] no part of the pleadings, either of his own knowledge or on information, is untrue. This, too, is an important part of the form and content of pleadings.

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[101]Justice Simrall in Weathersby v. Sinclair, 43 Miss. 189 (1870).

[102]Miss. Code Ann. § 8664 (1942), which is in part "I do solemnly swear I will use no falsehood."

[103]As amended May 7, 1950 by the Miss. Bar Commissioners and approved by the Supreme Court of Mississippi. See records of Mississippi Bar Asociation, 1950.

PROCESS SUFFICIENT TO REQUIRE A DEFENSE OR DEFAULT JUDGMENT

*Henry L. Rogers**

INTRODUCTION

The various Mississippi Statutes which deal with the subject of process have been compiled piecemeal, and the whole subject should be revised and correlated by the Legislature. The Bar Association is now recommending certain changes in our law to conform with the newly enacted statutes on pleadings, but until the entire subject is renovated, we will continue to have a different method of acquiring jurisdiction over many defendants of the same class.

It may be helpful at the outset to mention certain guide rules that are useful in evaluating the essential need of process and the manner of perfecting process upon defendants in actions at law. They are:

a. The principle object and purpose of process is to give the party to whom it is addressed notice of the proceedings against him,[1] and any process that substantially gives notice under the particular statutory method is ordinarily considered good process.[2] However, "notice" means the notice provided by law and the mere fact that a defendant has actual notice of an action against him is not sufficient process to acquire jurisdiction over him.[3] It is therefore evident that any judgment rendered without such notice is absolutely void.[4]

b. The notice must give to the party to whom it is addressed an opportunity to be heard before a competent tribunal vested with jurisdiction of the subject matter of the cause.[5] Section 14 of the Mississippi Constitution of 1890 guarantees that no man will be condemned nor divested of his rights until he has had an oppor-

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*Circuit Judge, Fifth Judicial District, Louisville, Mississippi.

[1]Hall v. Gulf South Utilities, 96 F. Supp. 351 (S.D. Miss. 1951); 42 Am. Jur., Process § 3 (1957); Brown v. Levee Commissioners, 50 Miss. 468 (1874).

[2]McAllum v. Spinks, 129 Miss. 237, 91 So. 694 (1922); Dunn v. Simms, 218 Miss. 227, 67 So.2d 261 (1953); Alabama & V. Ry Co. v. Bolding, 69 Miss. 255, 13 So. 844 (1891).

[3]Burns v. Burns, 133 Miss. 485, 97 So. 814 (1923); McCoy v. Watson, 154 Miss. 307, 122 So. 368 (1929); Falconer v. Frazier, 7 Sm. & M. 235 (Miss. 1846).

[4]Jack v. Thompson, 41 Miss. 49 (1866); Duncan v. Gerdine, 59 Miss. 550 (1882); Prentiss v. Mellen, 1 Sm. & M. 521 (Miss. 1844); Hemphill v. Hemphill, 34 Miss. 68 (1857).

[5]Gordon v. Gordon, 196 Miss. 476, 17 So.2d 191 (1944); 17 Am. Jur., Divorce and Separation § 685 (1938); 42 Am. Jur., Process § 4 (1957); 12 Am. Jur., Constitutional Law § 573 (1957); Howard Lumber Co. v. Hopkins, 136 Miss. 237, 101 So. 363 (1924).

tunity to be heard, and no judgment will be valid or binding upon him without due process of law;[6] nor can the Legislature pass a law depriving the citizen of the right to notice and the right to be heard.[7] The process must, therefore, fix a time and place for the defendant to appear and defend the action or proceeding which has been instituted against him.[8]

c. Defective or irregular process, unless it is void, may be amended.[9] Defective process is either void or voidable. If the process is voidable, that is to say irregular, but gives jurisdiction under the first two rules,[10] (as can readily be determined from the process itself), it may be amended.[11] For example, the undated return of an officer may be amended.[12] Section 1873, Code of 1942 uses the words, "Any matter required to be inserted or indorsed on any process may be amended on such terms as the court may deem proper."[13] On the other hand, void process cannot be amended.[14] It has been said, "Void process may be divided into two classes; namely, (a) process which is issued in violation of a statute prohibiting it,[15] and (b) process which is not in substantial compliance with the statutory requirements." The former cannot be amended and cannot be cured by waiver, consent, or agreement. A defect of the latter may be waived although it cannot be cured by amendment.[16] Section 1896, Code of 1942 excepts certain persons from process under certain circumstances.

ISSUANCE OF PROCESS

Process will not ordinarily be issued until a declaration has been filed.[17] It has been stated, "A summon shall not issue in any case . . . until the declaration . . . shall be filed."[18] A judgment will not be allowed to stand if process is issued before the declaration is filed;[19] nor

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[6]Rice v. McMullen, 207 Miss. 706, 43 So.2d 195 (1949).

[7]Donovan v. Vicksburg, 29 Miss. 247 (1855); Singuefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); Jack v. Thompson, note 4 supra.

[8]Britton v. Magnolia Casket and Supply Co., 210 Miss. 264, 49 So.2d 404 (1950); 42 Am. Jur., Process § 14.

[9]Reed v. General Motors Acceptance Corp., 228 Miss. 121, 87 So.2d 95 (1956).

[10]Allen v. Dicken, 63 Miss. 91 (1885).

[11]Lumpkin & Sons v. Russell, 108 Miss. 742, 67 So. 185 (1915).

[12]Betts v. Baxter, 58 Miss. 334 (1880).

[13]Dunn v. Sims, 218 Miss. 227, 67 So.2d 261 (1953).

[14]Joiner v. Bank, 71 Miss. 382, 14 So. 464 (1893); Johnson v. State, 202 Miss. 233, 31 So.2d 127 (1947).

[15]Claunch v. State, 208 Miss. 767, 45 So.2d 581 (1950).

[16]Miss. Code Ann. § 1872 (1942).

[17]Shackleford v. N. Y. Underwriters Ins. Co., 189 Miss. 896, 193 So. 31 (1940); Miss. Code Ann. § 1463 (1942).

[18]Merritt v. White, 37 Miss. 438 (1859); Nelson v. Rogers, 41 Miss. 635 (1868); Miss. Code Ann. § 1845 (1942).

[19]Frederick Smith Enterprise Co. v. Lucas, 204 Miss. 43, 36 So.2d 812 (1948).

can a waiver of process be filed until after the date of the filing of the declaration.[20]

There are certain proceedings where our law permits the filing of the declaration after process has been issued or other pleadings filed, but these are special statutory proceedings and are usually based on common law. They are: replevin;[21] garnishment on written suggestion;[22] eminent domain process issues from office of circuit clerk but is tried de novo in the circuit court on appeal;[23] quo warranto;[24] petition for mandamus or probation in lieu of declaration;[25] affidavit to establish liens.[26] The Judges of the Supreme Court and trial judges may issue remedial writs before pleadings have been filed in the trial court.[27]

FORM OF PROCESS

The style of process shall be, "The State of Mississippi," and shall issue over the name of the clerk of the court with the seal of his office affixed, and shall bear the date of its issuance.[28] This Code section does not apply to any process except in the chancery, circuit and county courts.[29] It excludes all other statutory process such as :justice of the peace process,[30] disbarment proceedings,[31] notices of Board of Supervisors,[32] municipal notices,[33] ordinary warrants for arrest,[34] notices of supervisors to equalize tax rolls.[35]

Although strict adherence to form is not absolutely necessary in issuing process to a defendant,[36] the process must bear the seal of the court[37] unless it is shown on the writ that there is no seal,[38] and it must be dated.[39] It must be issued in the name of the clerk.[40] Process in the name of the clerk signed by another is good process provided it is done with the consent of the clerk.[41] The process issued by a deputy must be

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[20]Miss. Code Ann. § 1872 (1942).
[21]Miss. Code Ann. § 2859 (1942).
[22]Jeffries v. Harvie, 38 Miss. 97 (1859); Miss. Code Ann. § 2783 (1942).
[23]Miss. Code Ann. §§ 2751, 2766(c) (1942).
[24]Miss. Code Ann. §§ 1121, 1126 (1942).
[25]Miss. Code Ann. §§ 1112, 1113 (1942).
[26]Christian v. O'Neal, 46 Miss. 669 (1872); Miss. Code Ann. §§ 341, 346, 350 (1942).
[27]Miss. Code Ann. § 1657 (1942).
[28]Miss. Code Ann. § 1844 (1942).
[29]Martin v. State, 190 Miss. 32, 199 So. 98 (1940).
[30]Mathews v. State, 134 Miss. 807, 100 So. 18 (1924).
[31]Ex-parte Cashin, 128 Miss. 244, 90 So. 850 (1922).
[32]Mullens v. Lyle, 183 Miss. 297, 183 So. 696 (1938).
[33]Miss. Power & Light Co. v. Batesville, 187 Miss. 737, 193 So. 814 (1940).
[34]Cooper v. State, 193 Miss. 672, 10 So.2d 764 (1942).
[35]Clanton v. Callender, 36 So.2d 140 (Miss. 1948).
[36]Hawkins v. McAlister, 86 Miss. 84, 38 So. 225 (1905).
[37]Pharis v. Conner, 3 Sm. & M. 87 (Miss. 1844); Burton v. Cramer, 123 Miss. 848, 86 So. 578 (1920); McAllum v. Spinks, supra note 2; 42 Am. Jur., Process § 12 (1957).
[38]Bruton v. Cramer, supra note 37.
[39]Miss. Code Ann. § 1844 (1942).
[40]Felder v. Merdith, 1 Walker 447 (Miss. 1831); 42 Am. Jur., Process § 10 (1957).
[41]Pharis v. Conner, supra note 37.

in the name of the clerk.[42] The process must have a return date,[43] and process returnable to a past due date is voidable,[44] but process returnable to a term of court is sufficient because the public has statutory notice of the terms of court.[45]

The process must command an officer to summon the person or persons named in the writ.[46] Mere clerical errors in the process, which are not confusing and do not leave in doubt the command of the writ, may be disregarded.[47] Although the process should be addressed to some officer as a matter of proper form,[48] under our law process may be good though it is not addressed to any officer.[49]

The process must give notice to the defendant of the time and place he is to appear.[50]

WHEN RETURNABLE

The process shall be made returnable to the first day of the term. The return term being that term, "wherein the writs in the action are all returned served or at which all the parties have entered their appearance."[51] Unless the process is executed five days before the return term, it shall require the appearance of the party at the next regular succeeding term of court.[52] If the clerk issues the process within five days before a term of court, he shall make it returnable to the next regular succeeding term of court.[53] When the process is served within five days, a judgment thereon is erroneous and may be set aside.[54] Process returnable instanter during a term of court is a nullity and not amendable.[55] Process returnable to a past due date is voidable,[56] but process returnable to an impossible date is void.[57] Process returnable before the "judge of our circuit court," is not void because of the surplus words "judge of our,"

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[42]Miss. Code Ann., § 1844 (1942); 42 Am. Jur., Process § 8 (1957).

[43]Miss. Code Ann. § 1848 (1942).

[44]Hendricks v. Pugh, 57 Miss. 157 (1879); Howard Lumber Co. v. Hopson, 136 Miss. 237, 101 So. 363 (1924) (this case holds that process returnable to a past date may be amended); Kelly v. Harrison, 69 Miss. 860, 12 So. 261 (1892); 42 Am. Jur., Process § 8 (1957).

[45]Miss. Code Ann. § 1519 (1942).

[46]Miss. Code Ann. § 1845 (1942); 42 Am. Jur., Process § 13 (1957).

[47]42 Am. Jur., Process § 8.

[48]Miss. Code Ann. § 1845 (1942).

[49]Hawkins v. McAlister, supra note 36; Miss. Code Ann. § 1872 (1942).

[50]42 Am. Jur., Process § 14.

[51]Thornton v. Fitzbaugh, 10 Sm. & M. 438 (Miss. 1848). But the plaintiff may elect to take judgment against those persons properly summoned where there are two or more defendants and additional process is issued for those not summoned. See Miss. Code Ann. § 335 (1942).

[52]Miss. Code Ann. § 1848 (1942).

[53]Robertson v. State, 87 Miss. 285, 39 So. 478 (1905); Thornton v. Fitzbaugh, supra note 51.

[54]See note 52 and 53 supra.

[55]Joiner v. Delta Bank, 71 Miss. 382, 14 So. 464 (1893).

[56]Hendricks v. Pugh, supra note 44.

[57]Johnson v. State, 202 Miss. 233, 31 So.2d 127 (1947).

since it is returnable before the "circuit court."[58] In computing the time required by statute for service of process, the day of serving the process shall be excluded and the day of the required appearance included,[59] unless it falls on Sunday, in which case Sunday will also be excluded.[60] Cases on appeal from a lower court are returnable to and triable at the first term after the appeal is perfected.[61]

PROCESS, BY WHOM EXECUTED

Sheriff or Deputy. The process of the circuit court shall "command the officer to summon the defendant,"[62] and is usually addressed to "any lawful officer." Although our Mississippi statute does not state to whom the process shall be addressed,[63] as do many of our criminal statutes,[64] the sheriff is the executive officer of the county, and, as such, is required to execute all orders of the court directed to him[65]—thus either he or his deputy[66] must issue such orders. The sheriff is liable both criminally[67] and civilly[68] for his failure to do so.

Notices shall also be served by the sheriff or his deputy.[69] The sheriff may serve process on his deputy, but the deputy cannot serve process upon the sheriff;[70] although under a prior decision an officer could not serve process unless it was addressed to him[71] we now have a statute that expressly states, "process shall be good though not directed to any officer."[72] In the event of the death of the sheriff, his deputy will continue to carry out the duties of this office until the office is filled by appointment.[73] The deputy cannot act for the sheriff when the sheriff is an interested party.[74]

Coroner. Under Section 3906, Code of 1942, the coroner is required to assume the duties of the sheriff: when there is a vacancy in the office

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[58]Dunn v. Simms, 218 Miss. 227, 67 So.2d 261 (1953); 42 Am. Jur., Process § 22 (1957); see annotations 154 ALR 1021 (1945).

[59]Miss. Code Ann. § 21 (1942).

[60]Nickles v. Kendrick, 76 Miss. 334, 24 So. 534 (1899); G. M. & O. Ry. Co. v. Forbes, 228 Miss. 134, 87 So.2d 488 (1956).

[61]Miss. Code Ann. § 1201 (1942).

[62]Miss. Code Ann. § 1845 (1942).

[63]Miss. Code Ann. § 1844 (1942).

[64]Miss. Code Ann. §§ 2605, 2614, 5856, 6837 (1942).

[65]Miss. Code Ann. §§ 4240, 4241 (1942); 42 Am. Jur., Process § 25 (1957).

[66]Henry & Hoyle v. Halsey, 5 Sm. & M. 573 (Miss. 1845); Miss. Code Ann. §§ 4235, 4239, 4241 (1942).

[67]Miss. Code Ann. §§ 2298, 4053, 4241 (1942).

[68]Miss. Code Ann. §§ 4049, 4242, 4244, 4245, 4246, 1878, 4241 (1942).

[69]Miss. Code Ann. § 1876 (1942).

[70]Ford v. Dryer, 26 Miss. 243 (1853).

[71]Arnold v. Wynn, 26 Miss. 338 (1853).

[72]Hawkins v. McAlister, 86 Miss. 84, 38 So. 225 (1905); Keys v. State, 155 Miss. 574, 124 So. 789 (1929); Miss. Code Ann. § 1871 (1942).

[73]Miss. Code Ann. § 4046 (1942).

[74]McLeod v. Harper, 43 Miss. 42 (1870); Dyson v. Baker, 54 Miss. 24 (1876).

of the sheriff and there is no deputy to act as authorized by law;[75] or in the event of the death of the sheriff; or when the sheriff is a party or has an interest in any suit; or when the sheriff is incapable or unfit to act in any particular case; or when there is a warrant for the sheriff's arrest, duly executed by the proper officer; or the sheriff is subject to arrest.

The coroner is not a peace officer with authority to act generally and can only act when the proper officer is not available or is incapacitated as above mentioned.[76] The coroner is subject to the same penalties as the sheriff for failure to perform the duties of the sheriff.[77] In the event there is no coroner in the county, the circuit judge or chancellor, upon proper information, may appoint some qualified elector to perform the duties of the coroner.[78]

Justice of the Peace. If there be no sheriff or coroner in the county, or if they are parties, or interested otherwise in a suit, the process may be directed to a justice of the peace, who is bound to execute the process under the same penalties as those that bind the sheriff.[79] Process addressed to an officer interested in a case will be quashed.[80] The justice of the peace is not authorized under the above statute to execute process he has issued.[81]

Special Officers, appointed to serve process. We have already mentioned the judge's appointment of a qualified elector to act as a coroner,[82] but there is another statute which authorizes the circuit judge to order process to be directed to any disinterested and proper person when the sheriff and coroner are disqualified, or there is a vacancy in said offices; or "or for other good cause shown."[83] This application must be made in writing and filed with the clerk and an order duly entered by the judge.[84] We have not been advised by our Supreme Court as to what is meant by "or for other good causes shown," as expressed in the statute, but the dissenting opinion in the *Claunch* case is enlightening on the authority of the justice of the peace to appoint persons to serve process.[85] It has been said that "good cause" is not arbitrary action,[86] but it would appear that "good cause" would indicate a judicial determination on evidence offered upon such application and would certainly involve judicial discretion.[87] Since these words, "good cause" are in

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75When there is a deputy he acts. See note 73 Supra.
76Millwood v. State, 198 Miss. 485, 23 So.2d 496 (1945).
77Miss. Code Ann. § 3906 (1942).
78See note 77 supra.
79Miss. Code Ann. 1879 (1942).
80McLeod v. Harper, 43 Miss. 42 (1870).
81McDugle v. Filmer, 79 Miss. 53, 29 So. 996 (1901).
82See note 77 supra.
83Miss. Code Ann. § 1877 (1942).
84Claunch v. State, note 15 supra.
85Claunch v. State, ibid; Miss. Code Ann. § 1814 (1942).
86Cherry v. Bivens, 185 Miss. 329, 187 So. 525 (1939).
87In Re Bishop, 211 Miss. 518, 52 So.2d 18 (1951).

addition to the disqualification of the officers of the vacancy of the office as expressed in the statute,[88] it is probable that they could mean "an emergency" as expressed in another section of the Code;[89] or "whenever in the opinion of the court the public interest will be subserved thereby," as expressed in still another Code section.[90] It has been said that the court has inherent power to do all things that are reasonably necessary for the administration of justice and could exercise such power over the court's process to prevent abuses, and it has been further stated that such power does not depend upon express words in the Constitution nor the will of the Legislature.[91]

HOW PROCESS IS EXECUTED

The process shall be executed by the officer in one of the following modes.[92]

First: The process shall be served upon the defendant personally if he can be found in the county by handing him a copy of the process.[93] A mere reading of the process to defendant is not sufficient service of process,[94] but where an officer offered the process to the defendant and he refused to accept it and would not permit the officer to read it to him, further execution of the process was not necessary.[95] The plaintiff can, however, obtain additional process until the defendant who has refused the process is properly served.[96]

Second: If the defendant cannot be found in the county,[97] the officer may leave a copy of the process at his usual place of abode[98] with his wife or some other person above the age of sixteen years who is a member of his family and willing to receive the process.[99] A process returned stating that it had been left with "his son" is not sufficient;[100] and a married sister of an absent property owner is not a member of her family,"[101] nor is process served upon a clerk at defendant's store sufficient.[102]

Third: If the defendant cannot himself be found and if no person

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88Miss. Code Ann. § 1875 (1942).
89Miss. Code Ann. § 1814 (1942).
90Miss. Code Ann. § 4235 (1942).
9114 Am. Jur., Courts § 171 (1957).
92At one time in Mississippi, process marked "executed" was a sufficient return.
93Miss. Code Ann. § 1859 (1942).
94French v. State, 53 Miss. 651 (1876); Carrollton Hardware and Implement Co. v. Marshal, 117 Miss. 224, 78 So. 7 (1918).
95Story v. Ware, 35 Miss. 399 (1858). See paragraph, "Kept off by force."
96Miss. Code Ann. § 1874 (1942).
97Griffith, Mississippi Chancery Practice, at p. 226, note 28 (1950). Judge Griffith in his excellent work has condemned one trip "not found" returns of the officer.
9842 Am. Jur., Process § 61.
99Miss. Code Ann. § 1859 (1942).
100Glenn v. Wragg, 41 Miss. 654 (1868).
101Hendricks v. Kellogg, 116 Miss. 22, 76 So. 746 (1917).
102Ford v. Britton, 41 Miss. 651 (1868).

of his family aged sixteen years and above can be found at his usual place of abode.[103] A substantial compliance with this method of execution is all that is required, but it must be substantial.[104] It must be remembered that any service of process other than personal delivery of process is a "substituted service," and is a departure from the common law; therefore, such statutes are strictly construed.[105] The meaning of the words, "place of abode," "other persons above the age of sixteen," "being one of his family," and "willing to receive," are all judicial questions to be determined in each case.[106]

When The Defendant is not Found in the County

When the officer fails to find the defendant, the plaintiff may cause new and additional process to be issued without formal order of the court until the defendant is found; or plaintiff may have a testatum writ issued to another county when the defendant has gone to another county after the filing of the declaration and the service of process. The plaintiff may cause an attachment to issue against the estate of the defendant if he is "not found,"[107] but the record must show in attachment proceedings that the action was rightfully commenced" and that the defendant is "not found in the county."[108]

When the Officer is Kept Off by Force

When the sheriff is prevented, by force, from serving process he may call to his aid the "power of the county" if necessary to carry out the command of the writ;[109] and when the sheriff has returned on the process the fact that he was prevented from executing the process, the plaintiff may cause the issuance of additional process, or he may proceed against the defendant as if the defendant had been duly served with process.[110]

Officer's Return of Process

When the officer receives the process issued by the clerk, he is required to mark on the process the date he received it.[111] He shall forth-

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[103]Miss. Code Ann. § 1859 (1942); Griffith, Mississippi Chancery Practice, at p. 226. Judge Griffith calls attention to the fact that the return must negative the first two requirements of this mode of service.

[104]Moorhead v. Caffhe, 52 Miss. 161 (1876); French v. State, 53 Miss. 651 (1876); Rigby v. Lefevre, 58 Miss. 639 (1881).

[105]42 Am. Jur., Process § 61.

[106]Bustamente v. Bescher, 43 Miss. 172 (1870); 42 Am. Jur., Process §§ 61, 62 and 63 (1957).

[107]Miss. Code Ann. § 1850 (1942).

[108]McNair v. Kaiser, 62 Miss. 783 (1885).

[109]Miss. Code Ann. § 4255 (1942).

[110]Story v. Ware, 35 Miss. 399 (1858); Miss. Code Ann. § 1874 (1942).

[111]Miss. Code Ann. § 1862 (1942).

with serve the process[112] and make his written return thereon, on or before the return date mentioned in the process.[113] His return should be a detailed written history of his acts in serving the process.[114] He is liable civilly and criminally if he fails to do so.[115]

The form of the officer's return is set out in the Code of 1942, and it should be noted that the last paragraph of this Section requires the officer to negative his ability to make the preceding return or returns.[116] It is not enough to simply state, "executed by personal service,"[117] or "read to defendants;"[118] or "left copy at boarding house of defendant;[119] or "left copy with his wife."[120] The officer is required to state exactly the manner in which he executed the process.[121] The court must be fully informed by the process of the acts of the officer,[122] but failure to state facts may not vitiate a judgment.[123]

Alias Process Return. When the officer fails to return the first process and alias process is issued, the officer shall not execute the second process but shall return the first process issued and executed by him, if he has it, and if not, he shall return the second process with the returns showing the execution of the first process, and proceedings will be made as if the first process had been duly returned.[124]

Return of the Officer Challenged

The return of the officer may be challenged in the same action by either of the parties who show it to be untrue, but the officer himself shall not be permitted to question its truth.[125] The parties may offer proof to show that the return is incorrect.[126] The method used heretofore to attack the officer's return has been by plea in abatement on issue joined and a hearing before a jury,[127] but under our modern practice

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[112]Taylor v. State, 137 Miss. 217, 102 So. 267 (1924); 42 Am. Jur., Process § 26 (1957).

[113]Ibid.

[114]Moore v. Coats, 43 Miss. 225 (1870); Rankin v. Dulaney, 43 Miss. 197 (1870); Woodliffe v. Conner, 45 Miss. 552 (1871); Dogan v. Barnes, 76 Miss. 566, 24 So. 965 (1899).

[115]Miss. Code Ann. §§ 1862, 4241, 4242 (1942).

[116]Miss. Code Ann. § 1861 (1942).

[117]Dogan v. Barnes, supra note 114.

[118]Carrollton Hardware and Implement Co. v. Marshal, supra note 94.

[119]Smith v. Cohea, 3 How. 35 (Miss. 1838).

[120]Mullens v. Sparks, 43 Miss. 129 (1870).

[121]Merritt v. White, 37 Miss. 438 (1859); Burrus v. Burrus, 56 Miss. 92 (1878).

[122]Rankin v. Dulaney, supra note 114.

[123]Reed v. General Motors Acceptance Corporation, 228 Miss. 121, 87 So.2d 95 (1956).

[124]Miss. Code Ann. § 1875 (1942).

[125]Duncan v. Geraldine, 59 Miss. 550 (1882); Miss. Code Ann. § 1880 (1942); 42 Am. Jur., Process § 127 (1957).

[126]City of Meridian v. Trussell, 52 Miss. 711 (1876).

[127]Mayfield v. Barnard, 43 Miss. 270 (1870).

the defense is set out in the answer and reached by motion to hear separately[128]—but this is discretionary with the court.[129] The trial courts have generally heard evidence on the motion without a jury, as is done in the chancery court,[130] in order to first determine whether or not there are sufficient facts at issue on the motion to bar the action, as an aid to the trial judge.[131]

Amendment of Returns

There is a presumption that the officer served the proper person and that the returns of the officer are correct.[132] The sheriff cannot testify to contradict his returns.[133] The officers' returns may be amended to show the facts even after motion has been made to quash the writ,[134] and, in some instances, after judgment.[135] The court may require the officer to make his returns,[136] which may be set aside as irregular or amended on such terms as the court deems proper.[137]

The appearance of the defendant, however, waives defective process,[138] and where the process is quashed on motion of defendant, he is deemed to have entered his appearance to the next term of court.[139]

PROCESS UPON INFANTS

Mississippi statutory service of process upon infants is as follows:[140]

> "If the defendant be an unmarried infant the process shall be served upon him personally, and upon his father, mother, or guardian, if he have any in this state, but if he be married, process may be served as on an adult. If an unmarried infant be joined as co-defendant with his father or mother or guardian, it shall not be sufficient to summon such infant and his father or such infant and his mother, or such infant and his guardian, in one process, but one copy of the process shall be served on the infant personally and a copy served personally on such father or mother or guardian."

128Miss. Code Ann. § 1475.5 (1942).

129Christopher v. Brown, 211 Miss. 322, 51 So.2d 579 (1951); Sherman v. Stewart Co., 216 Miss. 549, 62 So.2d 876 (1953).

130Reichman Crosby Co. v. Horton, 143 Miss. 141, 108 So. 443 (1926).

131Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 204 (1934); Home Insurance Co. v. Watts, 91 So.2d 722 (Miss. 1957).

132Sanders v. Dowell, 7 Sm. & M. 206 (Miss. 1846).

133Planters Bank v. Walker, 3 Sm. & M. 409 (Miss. 1844); Duncan v. Gerandine, 59 Miss. 550 (1882).

134Miss. Code Ann. § 1873 (1942); 42 Am. Jur., Process § 131; See note 133 supra.

135Lumpkin v. Russell, 108 Miss. 742, 67 So. 185 (1915).

136Miss. Code Ann. § 1862 (1942).

137Miss. Code Ann. § 1873 (1942).

138Bustamente v. Bescher, 43 Miss. 172 (1870); Hathcock v. Owens, 44 Miss. 799 (1871).

139Miss. Code Ann. § 1881 (1942).

140Miss. Code Ann. § 1863 (1942); 27 Am. Jur., Infants § 139.

No jurisdiction can be obtained of an infant unless it is shown affirmatively that the statute has been complied with, or that the infant has no father, mother, or guardian within this state. It would appear that this fact might be shown by proof as well as by the officer's return.[141] Where mother and child co-defendants are summoned in one process (the mother's relationship appearing upon the face of the summons), a return showing a delivery of a copy to each is sufficient.[142] The record must affirmatively show every essential under the statute in order to show proper service of process upon an infant.[143] An appearance by an attorney for an infant is insufficient because he cannot waive process for the infant.[144] Any judgment against an infant which does not comply affirmatively with the process statute is void,[145] and a judgment against an adult will not aid a void judgment taken against a minor.[146] The appearance of the minor, himself, in court will not bind him if he has not been served according to law, and the court is without jurisdiction to proceed against him.[147] When the minor has been properly served in compliance with the statute, the court has jurisdiction and may proceed as in any other case, and this is true although the court does not appoint a guardian ad litem.[148] Section 1309, Code of 1942, provides, "A decree or judgment of any court shall not be void or erroneous because of the failure to have a guardian ad litem . . . ," but it has often been held by other courts that a judgment by default cannot be taken against an infant.[149] It seems that it is necessary to make proof on trial rather than take judgment by default in Mississippi.[150]

SERVICE OF PROCESS ON THE STATE, COUNTY, AND CITY GOVERNMENT

The State, its subdivisions, and agencies, are not subject to a suit in the courts of this state[151] except when expressly authorized and such authority cannot be implied;[152] therefore, the power to sue is measured

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141Stanton v. Pollard, 24 Miss. 154 (1852); Erwin v. Carson, 54 Miss. 282 (1876); Moody v. McDuff, 58 Miss. 751 (1881); Gibson v. Currier, 83 Miss. 234, 35 So. 315 (1903); Prudential Insurance Co. v. Gleason, 185 Miss. 343, 187 So. 229 (1939).

142McIlvoy v. Alsop, 45 Miss. 365 (1871); (the wisdom of this case is doubted); Culley v. Rhodes, 124 Miss. 640, 87 So. 136 (1921); Baldwin v. Thompson, 132 Miss. 125, 95 So. 835 (1935).

143Ingerson v. Ingerson, 42 Miss. 155 (1868); Mullins v. Sparks, 43 Miss. 129 (1870); Moody v. McDuff, 58 Miss. 751 (1881); Erwin v. Carson, 54 Miss. 282 (1876); Gibson v. Currier, 83 Miss. 234, 35 So. 315 (1903).

144Parker v. Smith, 150 Miss. 849, 117 So. 249 (1948).

145Gibson v. Currier, supra note 143.

146Wirtz v. Gordon, 187 Miss. 866, 184 So. 798 (1938).

147Carter v. Graves, 93 So.2d 177 (Miss. 1957).

148Culley v. Rhodes, 124 Miss. 640, 87 So. 136 (1921); Hutton v. Hutton, 102 So.2d 424 (Miss. 1958).

14927 Am. Jur., Courts § 129.

150McIlvoy v. Alsop, 45 Miss. 365 (1871); Edmunds v. Mister, 58 Miss. 765 (1881).

151See Southern Digest, States, Key number 191 for cases on this point.

152State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933).

by statute authorizing suit.[153] Where the Legislature has authorized suits against the state,[154] summons may be served on the Attorney General in the same manner other process is served, but no judgment by default may be taken against the state.[155]

The Legislature has authorized suits against counties[156] and municipalities,[157] and the process against a county may be served upon the president or clerk of the Board of Supervisors in a case against a county, and the mayor or municipal clerk in a case against a municipality.[158]

It should be noted here that as late as 1932 the Legislature permitted writs of garnishment to be served upon the State, county, municipality, and other political subdivisions of the state.[159]

PROCESS ON PERSONS OF UNSOUND MIND

Our statute authorizing process on persons of unsound mind is as follows:

> "If the defendant be a person judicially declared of unsound mind, service of process shall be on him, and upon his guardian, if he have any, but if such defendant be an inmate of an insane hospital, and the superintendent shall certify that he is mentally incapable of responding to process, service of process on such person shall not be required and the certificate of the superintendent shall be indorsed on or attached to the process for such defendant and shall be in lieu of service thereof."[160]

It is important to remember that the service upon the guardian and the lunatic must be made separately,[161] and this may be done at different times. [162] It has been stated in the text-books that process upon persons of unsound mind who have not been declared lunatics by judicial proceedings, and who are not in institutions, and who do not have guardians, may be served in the same manner as other persons.[163] It is the general practice in the United States where the defendant is shown to be insane to require a guardian if the defendant is an infant, and to appoint an attorney to represent him if he is an adult.[164] One of the recent cases in Mississippi has approved indirectly the theory that an insane person should be represented[165] by declaring, "The fact that Dana was represent-

153State Highway Commission v. Gully, 167 Miss. 631, 145 So. 351 (1933).
154Miss. Code Ann. § 4387 (1942).
155Miss. Code Ann. § 4388 (1942).
156Miss. Code Ann. § 2955 (1942).
157Miss. Code Ann. §§ 3374 (2), 3374-112 (1942).
158Miss. Code Ann. § 1865 (1942).
159Miss. Code Ann. § 2883 (1942).
160Miss. Code Ann. § 1864 (1942).
161Potts v. Hines, 57 Miss. 735 (1880).
162Owens v. Sumrall, 204 Miss. 15, 36 So.2d 800 (1948).
16328 Am. Jur., Insane and Other Incompetent Persons § 112 (1957).
16428 Am. Jur., Insane and Other Incompetent Persona § 109 (1957).
165Dana v. Zerowsky, 192 Miss. 302, 5 So.2d 423 (1942).

ed throughout the litigation in a manner calculated to conserve and protect his rights is of more importance than the characterization of such representative." It appears that a suit by a guardian ad litem, or next friend, will bind a lunatic.[166] A non compos mentis can bring suit through his next friend.[167] The voluntary appearance of a guardian ad litem without process has been questioned by the text-books,[168] as has the appearance of a natural or legal guardian.[169] Our Court has held that the voluntary appearance of an unmarried minor confers no jurisdicton on the court,[170] and the Court would likely hold that the voluntary appearance of a known lunatic would confer no jurisdiction on such person until someone was appointed to represent him and such person had been properly brought into court—because if plaintiff knew of defendant's insanity and failed to inform the court, it may be considered a fraud upon the process of the court. The text-books seem to hold that a judgment taken without representation against a person of unsound mind is not void, but voidable, and not subject to collateral attack; nevertheless, Mississippi is a common law state and the ancient writ of *coram nobis* has been used to vacate a judgment against a known lunatic.[171] A judgment against an idiot by default is a nullity.[172]

PROCESS ON PRISONERS, PARTNERS, AND EXECUTORS

Prisoners. Process may be made upon a prisoner "if the defendant be imprisoned by the sentence or judgement of any court, either in a county, city, town, or village jail, or in the state penitentiary, the officer to whom the process is addressed may serve it himself, or service by the jailer or keeper of the penitentiary shall be sufficient."[173]

Partners. In actions against partners, some of whom are non-residents of this state, or cannot be found, service of process on such partners as may be found in this state shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned.[174]

A judgment against all of the partners when only one has been summoned is erroneous, unless the officer's return shows or it is shown elsewhere in the record that those not summoned were non-residents

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166Gillespie v. Hauenstein, 72 Miss. 836, 17 So. 602 (1895); Dana v. Zerowsky, ibid.

167Columbia Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931); Gillespie v. Hauenstein, supra note 166.

168See note 163 supra.

16925 Am. Jur., Guardian and Ward § 97.

170Carter v. Graves, 93 So.2d 177 (Miss. 1957).

17128 Am. Jur. Insane and Other Incompetent Persons § 116 (1957); 34 ALR 221 (1925); 140 ALR 1336 (1942).

17228 Am. Jur., Insane and Other Incompetent Persons § 116 (1957).

173Miss. Code Ann. § 1867 (1942).

174Miss. Code Ann. § 1869 (1942).

and could not be found.[175] A suit may be brought against one partner without taking judgment against the other partner on a note since the obligation is joint and several, and judgment against one would not affect plaintiff's rights against others unless satisfaction is obtained.[176] Process must be served on each partner in order for the judgment to be binding on each.[177]

Executors and Administrators. If there are two or more executors or administrators of an estate and process cannot be served upon all of them, service on one will be sufficient to authorize a judgment against all of them.[178]

SERVICE OF PROCESS ON CORPORATIONS

Service of process upon a corporation may be executed by delivering a copy to one of the following:[179]

> President or head of the corporation, the cashier, secretary, treasurer, clerk, or agent of the corporation, or upon one of the directors of the corporation.
>
> If the corporation is a sleeping-car company, service may be made upon the conductor.
>
> If a steamboat company, process may be served upon the captain or other officer of a boat thereof.
>
> In suits against railroad, sleeping-car, telegraph, telephone, express, steamboat, and insurance companies or corporations, or in suits against a receiver or receivers in charge of the property of any such company or corporations, the process may be served on any agent of the defendant, or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized; or served on any one of the foregoing officers of such corporation or company and upon the secretary, cashier, treasurer, clerk, depot agent, attorney or any other officer or agent of such receiver or receivers, or upon any of them in person.

When any writ of process against such corporation, company, receiver, or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons. All process and notices to be served upon such companies, corporations or receivers may be served as directed.[180] The

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175Tabler v. Bryant, 62 Miss. 350 (1884).
176Enochs & Flowers v. Bank of Forrest, 172 Miss. 36, 159 So. 407 (1935).
177See note 176 supra.
178Miss. Code Ann. § 1868 (1942).
179Miss. Code Ann. § 1866 (1942).
180See note 179 supra.

principal place of business is synonymous with domicile.[181] A delivery of a copy of process to a clerk to be delivered to the president of the company is not sufficient.[182] Foreign corporations becoming domesticated are required to designate an agent for the purpose of process, and on failure to do so, the Secretary of State is the agent for the purpose of process.[183]

PROCESS UPON FOREIGN CORPORATIONS, FIRMS AND PERSONS

Foreign Corporations. Foreign corporations doing business in Mississippi are subject to suit here,[184] and process may be served upon any agent of the corporation found within the county where the suit is brought regardless of the legal character of the agent. Where there is no agent in the county, process may be served upon any person who represented the corporation at the time of the transaction out of which the suit arose. The officer serving the process shall state in his return all of the facts concerning the person upon whom the process was issued. The clerk of the court will also immediately mail a copy of the process to the home office of the corporation by registered letter, and file his certificate showing such mailing, and make a minute thereof on the docket. No judgment may be taken against the defendant until thirty days from the date of the mailing of the process.[185] A failure to comply with the essential steps required by this section[186] will not support a judgment, and such a judgment is void.[187] This section does not apply to insurance companies, nor can process be served in a county where the law requires the suit to be filed in another county.[188] This section of the Code[189] applies only to foreign corporations found doing business in Mississippi.[190] Where process is sought on a resident agent appointed under another section of the Code,[191] proof must be made in the record that such agent is a resident agent.[192] The Court has held that a mere soliciting agent is not such an agent upon whom process may be served,[193] nor is a traveling salesman of a company not "doing business in Mississippi" such an agent as is contemplated by the statute.[194] Process upon a plantation manager of a non-resident corporation is sufficient although the

181Plummer-Lewis Co. v. Fancher, 111 Miss. 656, 71 So. 907 (1916).
182Hyde Construction Co. v. Elton Murphy-Walter Travis Corporation, 227 Miss. 615, 86 So.2d 455 (1956).
183Miss. Code Ann. §§ 5319, 5343 (1942).
184Miss. Code Ann. § 5345 (1942).
185Miss. Code Ann. § 5346 (1942).
186See note 184 supra.
187Cudahy Packing Co. v. Smith, 191 Miss. 31, 2 So.2d 347 (1941).
188Fireman's Fund Ins. Co. v. Cole, 169 Miss. 634, 152 So. 872 (1934).
189See note 184 supra.
190Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943).
191Miss. Code Ann. § 5319 (1942).
192Superior Oil Co. v. Smith, 200 Miss. 782, 29 So.2d 114 (1947).
193Saxony Mills v. Wagner, 94 Miss. 233, 47 So. 899 (1909).
194Knower v. Baldwin, supra note 190.

defendant corporation had designated another as a resident agent insofar as the tolling of statute of limitations is concerned.[195] It has been held that the service of process is void if it does not designate the relation of the person on whom process is served,[196] but where the process shows service upon "E. M., agent of and for," it is sufficient.[197] Issuing summons to a past due return date[198] or taking judgment where the record does not reveal that the clerk mailed a copy of the process as required by Section 5346, Code of 1942, is void.[199]

Secretary of State—Agent for Process

Every foreign corporation, doing business in this state, whether domesticated, or simply authorized to do business within the state, shall file a written power of attorney designating the Secretary of State, or, in lieu thereof, an agent upon whom process may be served. By failing to do so, the foreign corporation shall not be permitted to bring or maintain any action or suit in any of the courts of this state,[200] and when the resident agent is also a corporation, process may be served on the officers named in the Code.[201]

In actions for damages against non-resident persons, corporations, firms, or partnerships, limited or general, who shall do business or perform any character of work or service in this state, such non-residents shall be deemed to have appointed the Secretary of State as their agent for the purpose of process.[202] This section (Section 1519, Code of 1942) applies to torts as well as contracts,[203] but not to corporations qualified under Mississippi law to do business in Mississippi.[204]

Automobiles, non-resident. Non-resident persons (or their agents) using the highways of Mississippi are deemed to have appointed the Secretary of State to be their true and lawful attorney for the purpsoe of process in any action growing out of a collision or accident which occurred while the non-resident or his agent was operating a motor vehicle upon the streets, highways, or else-where within the state.[205]

Investment Corporations. Security dealers or investments companies are required to file with the Secretary of State written appointment of an agent for the purpose of process, and this appointment shall be irrevocable.[206]

195Fredrick Smith Enterprise Co. v. Lucas, 104 Miss. 43, 36 So.2d 812 (1948).
196Supreme Ruling F.M.C. v. Sommers, 108 Miss. 54, 66 So. 322 (1914).
197National Surety Co. v. Holmes Co., 120 Miss. 706, 83 So. 8 (1919).
198Columbia Star Mills v. Wagner, 115 Miss. 625, 76 So. 557 (1917).
199Eminent Household v. Lundy, 110 Miss. 881, 71 So. 16 (1916).
200Miss. Code Ann. § 5319 (1942).
201Ibid.
202Miss. Code Ann. § 1437 (1942).
203Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So.2d 615 (1951).
204Miss. Code Ann. § 1470 (1942).
205Miss Code Ann. § 9352-61 (1942) as amended by Miss. Laws c. 262 (1958).
206Miss. Laws c. 202 (1958).

How Process Served Upon the Secretary of State

Service of process upon the Secretary of State shall be made by the sheriff of Hinds County, and his fee shall be paid in advance. The sheriff shall serve two copies of the process upon the Secretary of State. Under Section 1438, Code of 1942, the summons must bear the address of the defendant. The clerk of the court in which the proceeding is filed shall immediately, upon the filing of the declaration, send by registered mail, postage prepaid, a true copy of the process to the non-resident defendant. The clerk is required to file an affidavit and the registry receipt with the court as a record to show the mailing of the copy to the defendant.[207]

It should be noted here that process upon the Secretary of State as an agent for a non-resident (Section 1492, Code of 1942) and process upon an agent for a foreign corporation (Section 5346, Code of 1942) are not alike. Section 5346 requires the clerk of the court to file a certificate showing that a copy of the process was mailed, and a note must be made by the clerk upon the docket showing his actions. On the other hand, Section 1492 requires an affidavit together with the registry receipt. The process against the Secretary of State (Sec. 1438) shall have the same force and effect as if such non-resident had been duly served within the state. Again, under Section 5346 no judgment can be taken until 30 days from the date of the mailing of the process.

It should also be noted that in suits under the non-resident motorist statute the Secretary of State must be paid three dollars for each defendant, and two copies of the process must be delivered for each of the defendants with the address of the defendants written on the process.[208] In addition thereto, notice or delivery by certified or registered mail, or an affidavit showing actual delivery of process to the defendant, or a return receipt showing a refusal to accept the delivery of the process, shall be filed with the court where the action pending before judgment can be taken.

Process Upon Domesticated Foreign Corporations

When a foreign corporation becomes domesticated under the laws of the State of Mississippi,[209] process may be served upon the Secretary of State, or any agent of such corporation in this state, and such service of process shall be as effectual as if it had been served upon the officers of a domestic corporation.[210] However, when foreign corporations appoint a resident agent, they are exempt from service of process upon the Secretary of State.[211]

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[207]Miss. Code Ann. § 1438 (1942).
[208]Miss. Code Ann. § 9352 (1942). Amended by Miss. Laws c. 262 (1958).
[209]Miss. Code Ann. §§ 5339, 5340, 5341 (1942).
[210]Miss. Code Ann. §§ 5319, 5342 (1942).
[211]Miss. Code Ann. § 1440 (1942).

Process Upon Foreign Persons, Firms and Partnerships

Process may be served upon all persons, firms, corporations, or co-partnerships carrying on business in the State of Mississippi by or through trustees, or attorneys in fact, by serving process upon such trustees, or attorneys in fact, or agents in the same manner as is provided for service of process upon foreign corporations.[212]

Process Upon Insurance Companies

Process upon Mississippi insurance companies may be served as process upon other corporations,[213] and suits may be brought in any county where a loss may occur; or if on a life insurance policy, in the county where the beneficiary resides or at the principal place of business of such corporation, and if a foreign company, in any county where process may be served upon an agent of the company.[214] All foreign insurance companies doing business in Mississippi are required to file an instrument appointing the Commissioner of Insurance as attorney upon whom all process in any action may be served. The service of process upon the Commissioner of Insurance shall be made by leaving a copy of the process in the office or hands of the Commissioner of Insurance, and copies of such instrument shall be deemed sufficient evidence thereof. Service of process upon the Commissioner of Insurance shall be deemed service upon the company.[215] This section of our Code also provides that the insurance company shall appoint an agent, in writing, signed by the president and secretary or manager or general agent, to acknowledge service of process for and on behalf of the insurance company—thus consenting to the service of process on the agent and such service will be as valid as if served upon the company. It will be noted that this section of the Code requires that the insurance company waive all claims of error by reason of service on the agent.[216] The Commissioner of Insurance is required to notify the company or its agent, but the failure to do so does not affect the validity of the service of process upon the Insurance Commissioner.[217]

Process Upon Fraternal Benefit Societies

Every fraternal benefit society, whether domestic or foreign, shall appoint the "Superintendent of Insurance" to be its lawful attorney on whom all legal process shall be served and must agree that such service shall be of the same legal force as if served upon the society. Service shall only be made upon such attorney and shall be in duplicate. In his ab-

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212Miss. Code Ann. § 1860 (1942).
213Miss. Code Ann. § 1866 (1942).
214Miss. Code Ann. § 1435 (1942).
215Miss. Code Ann. § 5672 (1942).
216Miss. Code Ann. § 5672 (4) (1942).
217Miss. Code Ann. § 5635 (1942).

sence, the person in charge of the office shall be served with the process; provided, however, that no service shall be binding or valid when it requires an answer or pleading within thirty days from the date of mailing the copy of service to such society.[218]

Process Upon Burial Associations

Domestic burial associations may be summoned by process as other domestic corporations.[219] Service of process upon foreign burial associations may be made by serving process upon the Insurance Commissioner.[220] The similarity of the service of process upon the Insurance Commissioner for foreign burial associations[221] and process upon the Insurance Commissioner for fraternal benefit societies[222] will be observed with the following exceptions:

Process upon fraternal societies[223] requires that process be served only on the Insurance Commissioner and that process must be served in duplicate; moreover, no answer or pleadings can be required in less than thirty days. On the other hand, process upon foreign burial associations only requires that one copy be left with the Insurance Commissioner or in his office.[224] It is also of interest to observe that the State Commissioner of Insurance[225] is designated by our statute as "Superintendent of Insurance" for process on fraternal societies.[226]

Process Upon Carnival, Circus, and Fair

In addition to the service of process against non-residents in any county where the defendant may be found,[227] and process in attachment proceedings for debt,[228] (which do not lie in actions based on actions ex-delicto)[229] we now have, since 1952, a new law whereby process may be served upon any carnival, circus, fair or any other concern or organization not permanently domiciled in this state by serving a copy of the process and a copy of the petition upon the Secretary of State together with a fee of two dollars and fifty cents ($2.50). The last known address of the defendant must be given to the Secretary of State, who will immediately mail to the defendant a notification of said service of process by restricted registered mail.[230] It is expressly provided that this form of pro-

218Miss. Code Ann. § 5760 (1942).
219Miss. Code Ann. § 1866 (1942).
220Miss. Code Ann. § 5595 (1942).
221Ibid.
222Miss. Code Ann. §§ 5617, 5760 (1942).
223Ibid.
224See note 222 supra.
225Miss. Code Ann. § 5816 (1942).
226See note 222 supra.
227Miss. Code Ann. §§ 1437, 1438, 1440, 5346 (1942).
228Miss. Code Ann. §§ 2675, 2686, 2687 (1942).
229Fellows v. Brown, 38 Miss. 541 (1860).
230Miss. Code Ann. §§ 1866-1-2 (1942).

cess adopted by the Legislature does not prevent personal service of process upon defendants found in Mississippi or in the county where the actions accrue.[231]

This section[232] was amended in 1958 so as to permit the service of process in the same manner and with the same force and effect as is provided for service of process on non-resident motorist defendants under Section 9352-61, Code of 1942, as amended by the Mississippi General Laws c. 262 (1948). This amendment will likely cause confusion since it did not repeal the method established by Section 1866-02, Code of 1942, and while the two statutes are similar, they are not identical in every respect.[233]

PROCESS UPON THE DEFENDANT BY PUBLICATION

It is well known, of course, that the process of one state cannot run into another so as to give personal jurisdiction over the defendant,[234] but the law does permit process by publication in respect to proceedings in rem or quasi in rem. The law may, in proper cases, authorize the rendition of a judgment in personam on the basis of such constructive notice, but not as to non-residents, since the only judgment that may legally be predicated on service by publication is a judgment affecting the property brought under the control of the court[235] or one by virtue of the police powers of the state.[236] Personal service of process is the primary method of obtaining jurisdiction over the person of the defendant, and unless there is a statute authorizing another or substituted form of process, service of process must be personal.[237]

There are some instances in Mississippi where publication of notice to the defendant non-resident is permitted. They are: attachments,[238] scire facias process,[239] garnishment,[240] seizure of contraband,[241] and replevin.[242] Publication in all cases and in every court when authorized by law shall be made as prescribed for non-residents or absent defendants in chancery, unless otherwise provided.[243] It should be noted here that we have a statute which permits the service of process in another state or country. This statute provides for a method of acknowledgement of

231Miss. Code Ann. §§ 1866, 1866-5, 1866-6 (1942).
232Ibid.
233Miss. Code Ann. § 1866-2 (1942), compare Miss. Laws c. 262 (1958).
234Cudabac v. Strong, 67 Miss. 704, 7 So. 543 (1890).
23542 Am. Jur., Process §§ 47, 58, 77 (1957).
236Daves v. Nugent, 90 F. Supp. 522 (S. D. Miss. 1950).
23742 Am. Jur., Process §§ 53, 64 (1957).
238Miss. Code Ann. § 2693 (1942).
239Miss. Code Ann. § 1870 (1942).
240Miss. Code Ann. §§ 2787, 2799, 2804 (1942).
241Miss. Code Ann. § 2618 (1942).
242Miss. Code Ann. § 2858 (1942).
243Miss. Code Ann. §§ 1852, 1856 (1942).

process, or an affidavit showing process was served, and may be used in lieu of the service of process by publication,[244] but this does not authorize a personal judgment against the defendant.[245]

PROCESS ON APPEAL TO THE CIRCUIT COURT AND TO THE SUPREME COURT

Where an appeal is taken to the circuit court, the parties properly before the lower court or commission[246] are before the circuit court on appeal.[247] Where the defendant gives the required bond and the papers are properly sent up, no notice of appeal is necessary since the case is not a new action requiring "due process of law,"[248] and the case stands ready for trial de novo.[249] The circiut court has jurisdiction of the defendant although the defendant was not properly summoned in the lower court if he entered his appearance and makes a motion to quash the process.[250] The defendant may elect in such a case to either appeal or bring it to the circuit court's attention by certiorari.[251] It will be remembered that civil cases are returnable to and triable at the first term of the circuit court after an appeal.[252]

It will also be remembered that process is necessary on an appeal to the Supreme Court, and an appellee must have notice of the appeal.[253]

WAIVER OF PROCESS

There are several ways by which the law permits the taking of a judgment against a defendant although he has not been properly served with process. They are: office confession; confession or admission of a part; demand by defendant in which case a judgment nil dicit for that part admitted to be due may be taken;[254] waiver of process in writing which has been properly filed;[255] appearance of defendant, and defending an action without raising the question of process;[256] appearing and fixing motion to quash process;[257] judgment may be taken when defend-

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244Miss. Code Ann. § 1854 (1942).
245Cudabac v. Strong, supra note 234.
246Miss. Code Ann. §§ 1195, 1197, 6698-26 (1942).
247Miss. Code Ann. § 1198 (1942).
248Rowe v. Cannon, 84 Miss. 101, 36 So. 146 (1904).
249Cory v. Buddenroff, 98 Miss. 98, 54 So. 84 (1911).
250Illinois Central Ry. Co. v. Swanson, 92 Miss. 485, 46 So. 83 (1908).
251Turner v. Williams, 162 Miss. 258, 139 So. 606 (1932).
252Miss. Code Ann. § 1201 (1942).
253Beasley v. Cottrell, 94 Miss. 253, 47 So. 662 (1908); Miss. Code Ann. §§ 1898, 1958 (1942).
254Williams v. Harris, 2 How. 627 (Miss. 1837); Miss. Code Ann. §§ 1551, 1552 (1942).
255Townsend v. Beavers, 185 Miss. 321, 188 So. 1 (1939); Cullens v. Cullens, 187 Miss. 731, 193 So. 805 (1940); Miss. Code Ann. § 1881 (1942).
256Turner v. Williams, note 251 supra.
257Bustamente v. Bescherm, 43 Miss. 172 (1870); Hathcock v. Owens, 44 Miss. 799 (1871); Miss. Code Ann. § 1881 (1942).

ant appeals a case and causes it to be reversed for process.[258]

The law considers it a waiver to refuse process of the court when it is offered to him.[259] If an officer is prevented by force from serving the process, the plaintiff may have new process issued, or he may proceed as if the process had been duly served.[260]

A written waiver of process must be filed after the date of the filing of the declaration, and it must be under oath or acknowledgment.[261] A waiver of process does not apply to a minor, since neither he, nor his attorney, can waive his rights.[262]

WHEN TRIABLE

When the process has been served more than five days before the term of court to which it is returnable, the defendant is required to plead at that term of court,[263] but the defendant has the entire first day of the term in which to file his pleadings.[264]

If the process has been served more than thirty days before the return term, the defendant is required to plead within the thirty days unless the judge has granted more time in which to file pleadings under our pleading statute, and it is stated, "And for want of plea, judgment may be entered by default."[265] However, grave doubt has arisen in the minds of some lawyers as to whether or not the defendant is debarred from pleading on the first day although he has not filed a plea within the thirty days allowed by the foregoing Code section. The reason lawyers are concerned is because the process ordinarily commands the officer to summon defendant to "be and appear before the court on the first day of the term" in accordance with the process statute which expressly states, "it shall be returnable on the first day of the term,"[266] and the process usually directs the defendant, "to then and there plead, answer or demur." Our Mississippi Constitution guarantees, "no person shall be debarred from prosecuting or defending any civil cause . . . before any tribunal in the State . . . ,"[267] and requires, "all courts shall be open; and every person . . . shall have remedy by due course of law,"[268] meaning, "no one shall be personally bound until he has had his day in court."[269]

258Miss. Code Ann. § 1882 (1942).
259Story v. Ware, 35 Miss. 399 (1858).
260Miss. Code Ann. § 1874 (1942).
261Miss. Code Ann. § 1872 (1942).
262Winston v. McLendon, 43 Miss. 254 (1870); Parker v. Smith, 150 Miss. 849, 117 So. 249 (1928); 27 Am. Jur., Infants §§ 129, 140.
263Miss. Code Ann. § 1519 (1942).
264Schilling v. USF&G Co., 169 Miss. 275, 152 So. 887 (1934); Miss. Code Ann. § 1519 (1942).
265See note 263 supra.
266Miss. Code Ann. § 1848 (1942).
267Miss. Const. § 25 (1890).
268Miss. Const. § 24 (1890).
269Galpin v. Page, 85 U.S. 350 (1874); 12 Am. Jur., Constitutional Law § 269.

It is, therefore, a serious question as to whether or not the court could prevent the defendant from pleading on the first day of the return term of court, the very day he is notified to plead, because notice of time and place and right to be heard is so essential to "due process" that taking a default on "his day in court" might be considered legal entrapment.[270] The Bar Association is now recommending that this Section of the Code be amended so as to fix a time in vacation in which to plead and so as to establish a form of process that gives notice of the time therein.

When the pleading has been properly filed, any dilatory plea included therein may be heard at the return term although only five days notice has been given, but issues of fact cannot be tried until the next term of court unless there has been the full thirty days service of process.[271]

A case is not triable as to one defendant until it is ready for trial as to all defendants,[272] and service on several defendants will not validate a judgment by default against one not properly served for the time and in the manner required by law.[273] This does not mean a default judgment cannot be taken against one properly summoned; nor that plaintiff cannot elect to sue one of several defendants who are jointly liable.[274]

The clerk of the circuit court is required to make out a docket on which he shall set the cases triable at the approaching term, commencing with the first day and proceeding into the term so far as the number of suits may require, and a case shall not be taken up before the day on which it is set except by consent.[275] A judgment cannot be taken by default against plaintiff on the first day of the term of court unless the case was set for trial on that date.[276] Where the summons requires the defendant to plead on the first day, it is error to refuse to permit defendant to plead after his motion to quash the process has been overruled.[277] When the judge states a case will not be reached until a certain day, judgment by default before that time must be set aside.[278]

JUDGE'S DUTY ON MOTION FOR DEFAULT JUDGMENT

When the case has been called and the defendant does not appear and plaintiff makes his motion for default judgment, it becomes the

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270McAdory v. Turner, 56 Miss. 666 (1879); 12 Am. Jur., Constitutional Law § 595.

271Miss. Central Ry. Co. v. Aultman, 173 Miss. 622, 160 So. 737 (1935).

272Kelly v. Brooks, 57 Miss. 225 (1879); Khoury v. Saik, 203 Miss. 155, 33 So.2d 616 (1948); Robbins v. Berry, 209 Miss. 422, 47 So.2d 846 (1950).

273Day Lumber Co. v. Citizens Bank, 94 Miss. 212, 48 So. 727 (1909).

274Wren v. Pierce, 4 Sm. & M. 91 (Miss. 1845); Cox. v. Weed Sewing Machine Co., 57 Miss. 350, (1879); McCannon Co. v. Richardson, 117 Miss. 345, 78 So. 292 (1918); Miss. Code Ann. §§ 334, 335.5 (1942).

275Ball v. Sinking Fund, 3 Sm. & M. 127 (Miss. 1844); Miss. Code Ann. § 1418 (1942).

276International Shoe Co., v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927).

277Story v. Mayes, 35 Miss. 399 (1858); Miss. Code Ann. § 1848 (1942).

278Gardner v. Price, 199 Miss. 809, 25 So.2d 459 (1946).

duty of the judge to physically examine the process and returns and determine whether or not the defendant has been given legal notice.[279] The docket should be examined to determine whether or not there is a plea on file since default judgment cannot be taken until all pleas have been settled.[280] It must appear affirmatively of record that the defendant has been properly brought within the jurisdiction of the court.[281] The judge should also determine whether or not the declaration states a cause of action since a judgment cannot be based on pleadings that do not state a cause of action;[282] nor can it be assumed that anything is proved beyond what is shown on the face of the pleadings.[283] It has been held that a judgment on pleadings that do not state a cause of action is void.[284]

A judgment can be taken nihil dicit (he says nothing) when defendant does not deny a part due unless the defendant tenders the amount admitted,[285] and this common law rule has been, in effect, incorporated in our statutory law upon open accounts in which a verified account is required to be denied under oath, "particularizing wherein it is not correct."[286] However, our Court has held the defendant can submit his whole case for trial because the statute is not one of pleading and practice but one of evidence; therefore, a judgment by default will not be taken without offering proof.[287] The judge should bear in mind that although a judgment should not be taken while there is a plea on file, nevertheless, the court cannot set aside a judgment entered at a former term of court.[288] The judgment should show there are no pleas on file at the time of the judgment.[289]

On motion for default judgment, the court should also examine the exhibits attached to the declaration to determine whether or not there are other exhibits that should be attached. The above is true because our Mississippi Law[290] states that unless the necessary writing is annexed to the declaration, or filed therewith, the declaration may not state a

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279Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934).

280Hambrick v. Dent, 70 Miss. 59, 11 So. 608 (1892); Dalton v. Rhodes Motor Co., 153 Miss. 51, 120 So. 821 (1929); Randall v. Gunter, 181 Miss. 332, 179 So. 362 (1938).

281Winston v. Miller, 12 Sm. & M. 550 (Miss. 1849).

282Beck v. Rosser, 68 Miss. 72, 8 So. 259 (1890); Penn Mutual Life Ins. Co. v. Keeton, 95 Miss. 708, 49 So. 736 (1909); Odom v. Gulf S. I. R. Co., 101 Miss. 642, 57 So. 626 (1912); Carrier Lumber Co. v. Quitman County, 156 Miss. 396, 124 So. 437 (1929); Smith v. Dees, 158 Miss. 11, 130 So. 105 (1930); Stevens v. Barbour, 193 Miss. 109, 8 So.2d 242 (1942); Mutual Health & Accident Co. v. Crowder, 201 Miss. 92, 28 So.2d 654 (1947).

283Bradstreet Co. v. City of Jackson, 81 Miss. 233, 32 So. 999 (1902); Penn. Mutual Life Ins. Co. v. Keeton, supra note 282.

284Steel v. Palmer, 41 Miss. 88 (1866).

285Williams v. Harris, 2 How. 627 (Miss. 1837).

286Miss. Code Ann. § 1754 (1942).

287Parker v. Thornton, 206 Miss. 662, 40 So.2d 538 (1949).

288Dalton v. Rhodes Motor Co., 152 Miss. 51, 120 So. 821 (1929).

289Irving v. Montgomery, 3 How. 191 (Miss. 1839).

290Miss. Code Ann. § 1469 (1942).

cause of action;[291] and although the court has often held that this must be raised in the trial court,[292] it has also held that where the declaration does not state a cause of action and the question is raised, the writing must be annexed.[293] It will not support a default judgment.[294]

PROCESS, PRIVILEGES AND EXEMPTIONS

In conclusion, it is perhaps useful to call to the attention of the members of the Bar that there are certain persons, under certain conditions, who are exempt from service of civil process. It is generally known and accepted that ambassadors and public ministers, serving in foreign countries, are not subject to the laws of the country in which they serve.[295] It is also true that other persons are exempt from service of process because of public policy and among these are: congressmen and members of the legislature,[296] judges,[297] persons attending court as litigants and witnesses,[298] lawyers,[299] and non-resident officers of corporations.[300] There seems to be a difference of opinion of the courts as to whether or not persons who are residents of the state and served with process while at court in another county are exempt from service of process.[301] In Mississippi, we have a statute that provides for the transfer of such causes to the home county of the defendant.[302] The exemption may be waived since it is a personal privilege, and is waived unless claimed at the proper time.[303]

291Nivitt v. Rabe, 5 How. 653 (Miss. 1841); Tierney v. Duffy, 59 Miss. 364 (1882); State v. Cameron, 223 Miss. 50, 77 So.2d 716 (1955).

292Enochs-Flowers v. Bank of Forrest, 172 Miss. 36, 157 So. 711 (1934). Alexander v. Carsley, 199 Miss. 781, 25 So.2d 709 (1946); Britton v. Magnolia State Casket Co., 210 Miss. 264, 49 So.2d 404 (1950); Western Casualty Co. v. Fox-Everett Co., 223 Miss. 388, 78 So.2d 363 (1955).

293Home Ins. Co. v. Newman, 147 Miss. 237, 111 So. 455 (1927).

294Motors Ins. Corp. v. Holland, 90 So.2d 392 Miss. (1956).

29542 Am. Jur., Process § 135.

296Miss. Const. § 48 (1890).

29742 Am. Jur., Process §§ 140, 122 (1957); see cases annotated, 85 ALR 1340.

298Arnette v. Smith, 165 Miss. 53, 145 So. 638 (1933); Miss. Code Ann. § 1896 (1942).

29942 Am. Jur., Process § 141.

30042 Am. Jur., Process § 145.

30142 Am. Jur., Process § 146.

302Miss. Code Ann. § 1443 (1942).

303Arnett v. Smith, note 298 supra; 42 Am. Jur., Process § 156.

PROCEDURAL ASPECTS OF MOTIONS AND INSTRUCTIONS

*Taylor H. McElroy**

MOTIONS

A motion is a proposal intended to lead to action; in particular, it is a formal proposal made to a court. A motion is not a plea or pleading, but is an interlocutory procedure. An order predicated on a motion is one made by the court in the progress of the case requiring something to be done or observed, but not going to the merits of the controversy. It cannot be used to deal with the merits or settle important questions of the case since it is not a primary or plenary pleading. To attempt to settle the merits of the case by the use of a motion would constitute a want of due process of law under the Constitution.[1] The general principles appertaining to motions are: that it is the office of a motion to bring before the court some material incidental matter arising in the progress of the case that calls for an interlocutory order thereon; that a motion is made by and against the parties to the cause and the immediate officers of the court wherein the motion is made—note that it is not within the proper function of a motion to conduct thereunder that which amounts to another major litigation.[2]

A petition, in many respects, very nearly resembles a motion, and there seems to be no precise or positive boundary between them. Petitions are usually resorted to when a more detailed statement is required than can be conveniently contained in a notice of motion. Yet, either the one of the other is proper only when a cause is pending; or in a matter over which the court of chancery or the circuit court has jurisdiction under some special authority created by statute, and in which the statute directs that the jurisdiction created shall be exercised in a summary manner upon the petition.[3]

The Purpose of a Motion

The purpose of a motion is to bring to the attention of the court some pertinent matter or subject which arises in the progress of the case. Motions originated under the common law *ore tenus* and were very informal. The common practice today is to use the motion in the trial

*Circuit Judge, Third Judicial District, Oxford, Mississippi.

[1]Flournoy v. Smith, 3 How. 62 (Miss. 1938).

[2]Caperton v. Winston County Fair Association, 169 Miss. 503, 508, 153 So. 801 (1934).

[3]Hill v. Richards, 11 Sm. & M. 194 (Miss. 1848).

of the case, and it requires an interlocutory rule or order of the court which cannot appropriately or effectively be raised by any form of plenary pleading. We have many motions that are statutory, and the statute must be strictly followed in making a motion. All motions must be signed by the attorney and some require an affidavit. In some instances, it is difficult to determine whether it is a petition or a motion, but the requirements of the statute must be followed in both instances. Under the statutes, we have motions for continuances, for change of venue, to collect fines and costs, against officers in default, against constables for failure to perform their duty and pay over money, to suppress depositions, to quash indictments, to quash process or appearance, and for a special venire among many others.

The motion carries by its name, without more, an indication of its nature and character. Generally, a motion during the trial of a cause is made by dictating it to the court reporter for the record.

Since it is desirable that court procedure be simplified, the motion is available for all purposes which may not be reached by any regular pleading, and the use of the motion has been approved where its need is so clear as to be fairly indisputable.[4]

In the absence of statute, motions will not be allowed to usurp the regular formal pleading.[5] However, in some instances, the remedy by plenary proceeding or pleadings will not always bar a motion when clearly the motion is the more speedy, economical and efficacious.[6]

Therefore, motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions or to dispose of the merits of the case.[7]

Motion Docket

In chancery court, a statute requires the clerk to keep a motion docket in which he enters motions without request as they are filed.[8] The dockets have a space for each motion and in this space the clerk copies the body of the motion so that the court may not only call the motion

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[4]Caperton v. Winston County Fair Association, 169 Miss. 503, 508, 153 So. 801 (1934); Strickland v. Humble Oil and Refining Company, 194 Miss. 194, 11 So.2d 820 (1943); Jenkins & Boyle v. Rogers, 184 Miss. 182, 185 So. 603 (1939); McDowell v. Minor, 158 Miss. 788, 131 So. 278 (1930); Federal Credit Company v. Newman, 16 So.2d 619 (Miss. 1944); Brashier v. J. C. O'Connor & Son, 181 Miss. 872, 180 So. 67 (1938).

[5]McDowell v. Minor, 158 Miss. 788, 131 So. 278 (1930); Love v. Love, 158 Miss. 785, 131 So. 280 (1930).

[6]Gridley v. Duncan, 8 Sm. & M. 456 (Miss. 1847); Pugh v. Boyd, 38 Miss. 326 (1860).

[7]McDowell v. Minor, supra at note 5; Gridley v. Duncan, 8 Sm.&M. 456 (Miss. 1847); Marshall v. Hamilton, 41 Miss. 229 (1866); Tulley v. Herron, 44 Miss. 626 (1871); McCalve-Brooks Co. v. Oil Works, 113 Miss. 500, 74 So. 332 (1917); Kehlor Flour Mills Company v. Reaves Grocery Company, 113 Miss. 31, 73 So. 866 (1917); Griffith, Mississippi Chancery Practice, §§ 274, 367, 400, 402 (2d ed. 1950); Jenkins & Boyle v. Rogers, 184 Miss. 182, 185 So. 603 (1939).

from the docket but may read it as there copied. The opposite party may consult this docket from time to time to be advised whether a motion has been made in a particular case and the nature of the order sought. This suggests, in chancery court, that ordinarily the motion is expected to be in writing; that the motion is not to be lengthy; and unless especially provided by statute in particular cases or unless the circumstances are such that justice so requires it, no notice to the opposite party is necessary other than the entry on the docket.[9]

The statute does not provide for a motion docket in the circuit court and some counties do not have such a docket. However, by custom, some of the counties in the state have circuit court motion dockets and the attorneys may avail themselves of this local practice. When motions are filed, it is the better practice for the attorney to furnish the opposite party with a copy of the motion. Of course, this applies especially to statutory motions. Motions made *ore tenus* which are dictated to the court reporter for entry in the record should always be made in the presence of the opposing counsel, but unless a statute provides otherwise, an attorney does not have to furnish a copy to opposing counsel.

The Form and Contents of a Motion

Every motion made in a cause constitutes part of its history and is as much a part of the record as the declaration, plea, or judgment.[10]

The modern tendency is to make all motions in writing instead of orally. It is impossible in the trial when testimony is being taken to make all motions in writing, especially when they are not statutory and can be promptly dictated into the record. Motions are made orally when it is a matter of mere routine and fall distinctly within the pleadings or within other parts of the previously settled record, or it is clear that the granting of the order therein is manifestly a matter of right. Motions of substantial importance must be in writing, especially when the motion is based on extrinsic facts—that is on facts which lie outside the record. In such cases, a motion should be in writing supported by an affidavit setting up the facts. Unless the grounds are manifest without a statement of them, a motion must, in a fairly distinct way, state the grounds or reasons on which it is based, or it will be overruled.[11] However, it must be kept in mind that it is not the office of a motion to aver a fact. It cannot independently import a fact or facts into the record; it calls attention to facts, asks for an interlocutory order on the grounds averred, and unless the grounds are manifest, gives the grounds there-

[8]Miss. Code Ann. § 1244 (1942).
[9]Griffith, Mississippi Chancery Practice, § 401 (2d ed. 1950).
[10]Puckett v. Graves, 6 Sm.&M. 384 (Miss. 1846).
[11]Huston v. Hayter, 6 How. 580 (Miss. 1842); Germain v. Harwell, 108 Miss. 402, 66 So. 396 (1914).

for. Its basis, in fact, must be derived from some other part of the record and when the facts are not already of record, an affidavit must be filed with the motion as an initial part of it.[12]

Affidavits

Any extraordinary proceedings before the court in vacation, whether on motion or petition, should be supported by an affidavit stating the supporting facts. Otherwise, proof must be made by witnesses. Commonly, a motion is very short and to the point when made before the court in the trial of a case, and is treated as mere routine as a part of procedure, and must briefly show the particular ground or grounds relied upon, and the nature of the order requested in fair and intelligible language. A motion must establish all the known grounds upon which the movant relies, and those not set up may be deemed as waived. It is confined to incidental matters in the progress of the suit, and cannot, except under a special statute, be used for the decision of doubtful, grave, or difficult questions involving substantially the merits of the case. If a supporting affidavit must be used, it should be as brief as is consistent with a full statement of necessary facts. Such motions as change of venue, motions for continuance, and motions for new trials due to newly discovered evidence require an affidavit, and of course the statute must be strictly followed.[13]

The motion and affidavit should point out, with particularity, the proof and its materiality to the issues involved in the case so that the court may be fully advised as to the question before it.

Notice

A party should be present in court with his process, and any action which merely affects the process can be made without formal notice to the other party. But where such action extends beyond the process, it is necessary that notice be duly given.[14] All motions made orally during the trial of the case require no notice since all parties are present in court and a record is being made. Motions which are to be made in writing require notice if the trial is not in progress. The better practice, since no provision is made by statute for a motion docket in circuit court, is to give a copy of the motion to the opposite party. In chancery court, the written motion requires notice, but if a motion is made in and for term time and is promptly entered on the motion docket, it is sufficient notice unless otherwise provided by statute or by fixed rules of the court.[15]

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[12]Griffith, Mississippi Chancery Practice, § 402 (2d ed. 1950).

[13]Ruffin v. Page, 109 Miss. 12, 67 So. 648 (1918); Phillips v. Cannon, 129 Miss. 658, 92 So. 557 (1922).

[14]Haley v. Williams, 8 Sm.&M. 487 (Miss. 1847).

[15]Griffith, Mississippi Chancery Practice, § 404 (2d ed. 1950).

In legal strictness, parties are bound to take notice of any motion entered on the motion docket during the pendency of the suit. However, the parties to a suit are not required to take constructive notice of a motion in vacation, or between judgment and the adjournment of the term of court, even though it is entered on the docket.[16] In actual practice, where complaint is made by either party of non-receipt of notice, even though notice is not required by statute, the courts are very liberal to see that a copy of the motion is given the opposite party so he may have adequate time to examine the motion and be advised of its contents. In some instances, the statement of the attorney making the motion that he has given the other party a copy is deemed sufficient. Experience of the courts has shown that attorneys will not or should not make untrue statements in such matters.

The opposite party cannot subsequently object that no notice was given where no objection was made when the motion was heard by the court. Objection should be made before the court hears the motion and especially where the court hears the motion on proof.[17]

Proof and Hearing on the Motion

If a motion is properly made, the movant has a right to have his motion heard and determined on its merits by the court at the proper time and to have such relief awarded to him as may be proper under the circumstances. Except to the extent that the matter may be controlled by statute or rules of the court, the conduct of hearings on motions is largely within the judicial discretion of the judge, and the exercise of his discretion is not subject to review unless he has abused it. When the parties appear and resist a motion on its merits without objection to its temporal and technical regularity, this operates to wave all previous irregularities in the motion, and such irregularities are waived unless objection upon that ground is made at the first opportunity.[18] A motion is at issue without further pleading, and it is the duty of the movant to support his motion by proof. The averments contained in a motion do not amount to proof of the facts therein stated.[19]

The burden of proof is on the movant, and the right to open and close arguments is the same as in trials on the merits. No formal response to a motion is required, and the movant must support it by proof unless the opposite party consents to it.[20] Orders rendered by the court on a motion are interlocutory, and, therefore, are not binding on the court in

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[16]See note 14 supra.

[17]Izod v. Addison, 6 How. 432 (Miss. 1841).

[18]Ibid.

[19]Reed v. State, 143 Miss. 686, 109 So. 715 (1926); Young v. State, 150 Miss. 787, 117 So. 119 (1928); Shaw v. State, 188 Miss. 549, 195 So. 581 (1940); Shepard v. Johnston, 203 Miss. 120, 33 So.2d 614 (1948).

[20]Hudson v. Gulf Refining Co., 202 Miss. 331, 30 So.2d 66 (1947).

the further progress of the case. The court may set aside, revise or reshape the order according to justice and the rights of the parties before judgment is rendered, or before court has adjourned.[21]

Some statutory motions, if not disposed of during the term, are continued by force of the statute without any order to that effect.[22]

It is often the practice in both chancery and circuit court after the court reporter has begun taking his notes in a case and especially during the trial, for motions arising in the actual progress thereof to be dictated into the record, and likewise the rulings of the court thereon. This use of the stenographic record is allowed in the interest of convenience and to prevent the loss of time that would result if these motions were required to be first reduced to writing, entered on the docket, and the order then drawn up for the minutes.

Illustrations of Common Use of Motions

Motions are commonly used in the following instances: Where a pleading is filed out of time; a pleading that is manifestly a sham; where a pleading is frivolous; a pleading that can have no legitimate place in the proceedings under any possible view; to withdraw a pleading; for continuance; for a new trial; to amend a pleading; to require an officer to pay over money; to exclude evidence and give a directed verdict; to quash process; for time in which to plead; for additional time in which to plead; for change of venue in civil and criminal cases; to dissolve an injunction; for special venire; in arrest of judgment; bill of exceptions; motion for writ of certiorari; to take depositions; to amend an error in judgment; improper argument in trial; motion for bond; to protect property; for duces tecum; to be allowed to obtain papers from clerk's office; motion to transfer chancery or circuit court; to file new pleas; to quash execution and set aside a sale; officers improperly handling funds; where no pleading in answer to a declaration is on file, as well as others.

Statutory Requirements for Motion for Continuance

It is required by statute that on all applications for a continuance the party shall set forth in his affidavit:

1. The facts which he expects to prove by his absent witness or documents in order that the court may judge the materiality of such facts.
2. The name and residence of the absent witness.
3. That the party has used due diligence to procure the pres-

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[21]Hill v. Richards, 11 Sm. & M. 194 (Miss. 1848); Johnson v. Success Brick Company, 104 Miss. 207, 61 So. 178, *sugg. of error sustained*, 62 So. 4 (1913).

[22]Miss. Code Ann. § 1649 (1942); O'Branon v. Greenville Commercial Body Company, 159 Miss. 68, 132 So. 87 (1931).

ence of the absent witness, or the absent document, as the case may be, stating what diligence he has used.

4. The party must always allege that the motion for continuance is not sought for delay only, but that justice may be done.

The court may grant or deny a motion for continuance at its discretion, and, in civil cases only, may of its own motion cross-examine the party making the affidavit. The opposite party may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be a ground for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom.[23] The statutes must be strictly followed as to the requirements of affidavits,[24] and a motion for continuance that does not comply with the requirements of the statute is properly overruled by the court. We have many statutory motions and each should be studied with care and followed strictly.

INSTRUCTIONS – PROCEDURAL ASPECT OF

The instructions given in a law suit contain the principles of law applicable to the case.[1] Where there is no evidence upon which to predicate an instruction, it is erroneous to give it.[2] All instructions must be based on the facts of the case,[3] and an instruction concerning points not raised by the evidence are properly refused.[4] The proper practice is to refuse an instruction to the jury on a correct principle of law, if that principle is inapplicable to the facts of the case.[5] In a case in which the evi-

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[23]Miss. Code Ann. §§ 1520, 2522 (1942).

[24]Lamar v. State, 63 Miss. 265 (1885); Bone v. State, 207 Miss. 20, 41 So.2d 347 (1949); Hinton v. State, 175 Miss. 308, 166 So. 762 (1936); Lewis v. State, 56 So.2d 397 (Miss. 1952).

[1]Miss. Code Ann. § 1530 (1942).

[2]Burnley v. Mullins, 86 Miss. 441, 38 So. 635 (1905); American Cent. Ins. Co. v. Antrim, 88 Miss. 518, 41 So. 257 (1906); Bank of Newton v. Simmons, 96 Miss. 17, 49 So. 616 (1909); Baldwin v. Alabama & V. R. Co., 96 Miss. 52, 52 So. 358 (1910); New Orleans & N.E.R. Co. v. Williams, 96 Miss. 373, 53 So. 619 (1910); Hooks v. Mills, 101 Miss 91, 57 So. 545 (1912); Yazoo & M. Valley R. Co. v. Dyer, 192 Miss. 870, 59 So. 937 (1912); McLeod Lumber Co. v. Anderson Mercantile Co., 105 Miss. 498, 62 So. 274 (1913); Cumberland Telephone and Telegraph Co. v. Cosnaham, 105 Miss. 615, 62 So. 825 (1913); Yazoo & M. Valley R. Co. v. Aden, 106 Miss. 860, 64 So. 790 (1914); J. J. Newman Lumber Co. v. Dantzler, 107 Miss. 31, 64 So. 931 (1914); Western U. Tel. Co. v. Robertson, 109 Miss. 775, 69 So. 680 (1915); Collins v. Union & Farmers Bank, 110 Miss. 506, 70 So. 581 (1916).

[3]Fairfield v. Louisville & N. R. Co., 94 Miss. 887, 48 So. 513, 136 Am. St. Rep. 611 (1909); Easley v. Alabama G. S. R. Co., 96 Miss. 396, 50 So. 491 (1909); Hunnicut v. Alabama G. S. R. Co., 50 So. 697 (Miss. 1909).

[4]Mobile, J. & K. C. R. Co. v. Jackson, 92 Miss. 517, 46 So. 142 (1908); Kneale v. Dukate, 92 Miss. 201, 46 So. 715 (1908).

[5]Mississippi F. Ins. Co. v. Dixon, 133 Miss. 570, 98 So. 101 (1923).

dence supports but one theory upon which plaintiff is entitled to prevail, an instruction which might mislead the jury into another and different theory should not be given.[6]

The word "instruction" could apply to any direction given by the court, but, in a narrowed and more technical sense, our courts hold that the instructions are directions in reference to the law of the particular case. They are an exposition of the principles of the law applicable to the case at hand, or some other branch or phase of the case which the jury is bound to consider in order to render a verdict establishing the rights of the parties in accordance with the facts proven; or which the jury is bound to apply in order to render such a verdict as will, in the state of facts proven at the trial to exist, establish the rights of the parties in the suit before the court.[7]

It is provided by our statute that in any case, either civil or criminal, the judge is to instruct the jury, but it is well to remember the following rules:[8]

1. The judge shall not sum up or comment on the testimony.
2. The judge shall not charge the jury as to the weight of the evidence.
3. The judge, at the request of either party, shall instruct the jury upon the principles of law applicable to the case.
4. All instructions must be requested by the parties in the case.
5. All instructions must be in writing.
6. All alterations or modifications, given or refused by the court, shall be in writing.
7. The clerk, before they are read or given to the jury, shall mark all instructions requested by either party, or given by the court, as being "given" or "refused" as the case may be.
8. All instructions so marked shall be a part of the record on appeal without a bill of exceptions.
9. All instructions given by the court may be taken out by the jury after the arguments of the attorneys in the case.

In actual practice the instruction requested by each party, when they are given, are read to the jury by the attorneys before they argue the case. In some instances, attorneys read their instructions but do not argue the case before the jury.

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[6]Owen v. Sumrall, 204 Miss. 15, 36 So.2d 800 (1948).

[7]See notes 1, 2, 3, 4, 5, 6 supra. Scoggins v. Vicksburg Hospital, Inc., 91 So.2d 837 (Miss. 1957); Moak v. Black, 92 So.2d 845 (Miss. 1957); Vanderslice v. Shoemake, 102 So.2d 804 (Miss. 1958); Cobb v. Williams, 90 So.2d 17 (Miss. 1956); Hamilton v. McCry, 91 So.2d 564 (Miss. 1956); Moore v. Herman Guy Auto Parts Inc., 92 So.2d 373 (Miss. 1957); Jenkins v. Jenkins, 100 So.2d 789 (Miss. 1958); Moore v. Taggart, 102 So.2d 333 (Miss. 1958).

[8]Miss. Code Ann. § 1530 (1942).

Authority of the Judge

The judge does not have the authority to originate instructions not requested by an attorney in the case.[9] Even before the Constitution of 1890, the Court has uniformly held that the circuit judge cannot instruct the jury of his own motion, but can only instruct when written requests are made. When instructions have been presented, the judge may modify them, if incorrect, so as to conform to the law. It is manifest from the language of the statute that the judge is denied the authority or power of originating independent instructions of its own motion, not called for or rendered necessary by those requested by counsel. The parties, and the parties only, have the right to indicate by written request the points upon which they respectively desire the jury to be informed as to the law. Under our system, it would not be proper for the court to instruct sua sponte. If the instructions are correct and pertinent, the safe practice would be to give them as requested. It may sometimes happen that the same principle, with a slight variation of language, is embraced in several instructions, or that the court is asked to give an instruction which is but a repetiton of one already given, or it may appear that the language employed by the counsel is vague and obscure. The court may well decline to encumber the record with a repetition of instructions already granted, and should correct any obscurity in order that the jury may be properly advised as to the law of the case.[10]

Request for Instruction

The law forbids the judge to give an instruction not requested by the parties.[11] If counsel fails to request an instruction, he cannot complain that one was not given, even though it might be applicable to the case.[12] If a jury retires to consider their verdict, but returns to the court room to ask for further instructions, and the judge—without request from the state or the defendant—orally instructs the jury on the law of the case, it has been held that this further instruction to the jury by the court of its own motion is improper.[13]

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[9]Watkins v. State, 60 Miss. 323 (1882); Dement v. Summer, 175 Miss. 290, 165 So. 791 (1936); Bangs v. State, 61 Miss. 363 (1883); Masonite Corp. v. Lochridge, 163 Miss. 382, 141 So. 758 (1932). Parties cannot complain of instructions which are consented to. It has been held that the parties cannot complain of oral instructions given to the jury where from the record it appears that the counsel agreed that the instruction or instructions might be given. Kelly v. State, 95 So. 690 (Miss. 1923).

[10]Edwards v. State, 47 Miss. 581 (1873); Archer v. Sinclair, 49 Miss. 343 (1873); Masonite Corp v. Lochridge, 163 Miss. 382, 141 So. 758 (1932).

[11]James v. State, 106 Miss. 353, 63 So. 669 (1913); Johnson v. State, 106 Miss. 94, 63 So. 338 (1913); Dixon v. State, 106 Miss. 697, 64 So. 468 (1914); Pingle v. State, 108 Miss. 802, 67 So. 455 (1915); Davenport v. State, 121 Miss. 548, 83 So. 738 (1920).

[12]Tatum v. State, 142 Miss. 110, 107 So. 418 (1926).

[13]Edwards v. State, 47 Miss. 581 (1873); Stewart v. State, 50 Miss. 587 (1874); Bangs v. State, 61 Miss. 363 (1883); Watkins v. State, 60 Miss. 323 (1882); Williams v. State, 32 Miss. 389 (1856); Gilbert v. State, 78 Miss. 300, 29 So 477 (1901).

Written Instructions

The court has no authority to instruct a jury sua sponte.[14] All instructions must be in writing.[15] The trial judge is not permitted to instruct the jury orally in regard to the verdict which they are authorized to render.[16] The judge should take care not to infringe upon the province of the jury, and should try not to influence the verdict, but he has the right to give reasons for a ruling if he desires and to show why, in his opinion, the reasons advanced for a contrary ruling are unsound. Passing on questions of evidence is considered merely a ruling of the court, and where it appears that the judge had no intention of instructing the jury but was merely trying to clarify some question asked or some answer given, he may give a reason for the ruling. The statute does not place the judge in a strait-jacket, nor does it require him to remain silent during the progress of a trial. While it may be safer for him to rule without giving his reasons, he has the right to give such reasons if he so desires, and to show why, in his opinion, the reasons advanced for a contrary ruling are unsound. In so doing, the judge should not go too far and transgress the proprieties. Of course, "an overspeaking judge is no well-tuned cymbal . . . neither is an aphonic dummy a becoming receptacle for judicial power."[17]

Form of Instruction

The instructions should be on legal cap paper and should never be written out on a narrow strip. The better practice is to write long instructions on a full sheet of paper and short instructions on at least a half sheet. This is due to the fact that the clerk must file the instructions.

The usual form is, "The court instructs the jury for the plaintiff . . . ." If the instruction is on the evidence, the form should be, "The court instructs the jury for the plaintiff that if you believe from the evidence . . . ."[18]

The court will not reverse a case because the instruction is not happily phrased, or because it is not exactly technically correct. If the instruction is not misleading, or if the inaccuracy complained of could have no influence on the jury in reaching a verdict, then it cannot be said that the instruction is improper. Substantial accuracy is all that is required in an instruction, and unless the court feels that the jury may

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[14]Jones v. State, 276 Miss. 186, 62 So.2d 217 (1953).
[15]Miss. Code Ann. § 1530 (1942).
[16]Simmons v. State, 107 Miss. 463, 65 So. 511 (1914).
[17]Bompus v. State, 166 Miss. 276, 144 So. 897 (1932); Price v. State, 41 So.2d 37 (1949).
[18]Hatcher v. State, 210 Miss. 661, 50 So.2d 387 (1951).

have been misled, it will not reverse.[19] The fact that an instruction is technically inaccurate will not, alone, cause the reversal of a judgment; when the case is examined on appeal as a completed trial and substantial error has not been committed, the judgment will usually be affirmed.[20] The philological inaccuracy in an instruction is no ground for reversal of a judgment if the law is substantially correct.[21]

When Instructions May Be Granted

The correct practice, under our system, is for the court to pass on all instructions requested by both sides before the argument to the jury begins, but this should not be done secretly. This rule should be deviated from only in rare and emergent occasions in the discretion of the court, and even then only with opportunity to the opposite party to prepare and request any counter instruction applicable to their view of the facts; otherwise, great injustice might be done the defendant or plaintiff in favor of the party with the closing argument. Underhanded tactics should never characterize trials, especially trials involving life or liberty. The judge should so deport himself that no juror or bystander can determine his view of the facts. An unbiased jury should pass on facts; and this principle, on the theory of the law prevailing in Mississippi, is designed for the protection of the innocent since it is presumed that all men are innocent until proven guilty in the legal mode based on a fair and impartial administration of equal and exact justice.[22] Counsel on both sides should always know of the instructions given by the court even if they have to be interrupted in their argument before the jury. Generally, it is improper practice to give an instruction during argument to the jury, but this is proper in a case where the charge was clearly correct, and not so adroitly prepared as to possibly mislead the jury, and no injustice will be done to either party. In such case the court will not reverse for deviation from the usual procedure.[23] The requirement that requested instructions be presented to the court before argument is made to the jury is a reasonable one, and the court has the power to refuse a request to deviate from this procedure.[24] Our courts have held that though the orderly procedure would require all instructions to be submitted before the jury retires, accent is upon a clear understanding of, and instruction upon, the controlling issues and not upon procedural formulas. In the absence of prejudice, it is more important for the jurors to be

[19]Meridian Sanatorium v. Scruggs, 21 Miss. 330, 83 So. 532 (1920); Neely v. City of Charleston, 204 Miss. 360, 37 So.2d 495 (1948).

[20]Ibid.

[21]Oliver v. State, 39 Miss. 526 (1860).

[22]Montgomery v. State, 85 Miss. 330, 37 So. 835 (1905).

[23]Wood v. State, 64 Miss. 775, 2 So. 247 (1887); Montgomery v. State, supra note 23.

[24]See note 18 supra.

properly instructed than it is for the instructions to be given at the proper time, unless they are secretly instructed.[25]

Correction, Modification, and Withdrawal of Instructions

The judge may modify or correct an instruction so as to conform to the law of the case.[26] Our court has permitted amendments to instructions even after argument where the opposing counsel is given an opportunity to reply and to make comment thereon with no limitation of time.[27] A party cannot complain that a modified instruction was erroneous where he used the instruction, as modified, in the trial.[28]

Filing of Instructions

The clerk, before the instructions are read or given to the jury, is required to mark all instructions requested by either party, or given by the court, as being "given" or "refused" as the case may be.[29] The common practice is to give the instructions requested to the judge for his approval. The judge marks the instructions either "given" if they apply to the case and "refused" if he is of the opinion that the instruction is not a reflection of the law of the case. The clerk then stamps each instruction accordingly and signs his name to the instruction.

The Supreme Court has held that where all the instructions are either attached to each other and marked and filed by the clerk, or where each contains a notation of some kind sufficient to show the action of the court and all the instructions are filed by the clerk, it is sufficient for the purpose of constituting a part of the record on appeal.[30]

Instructions appearing in the record, without any statement as to whether they were requested by the prevailing party and which are not marked "given" or "refused" by the clerk, are not a part of the record.[31] Any person desiring to object to the modification or correction of instructions requested by him and who wishes to insist that the instructions as originally drawn were correct, should have the instructions marked to show that it was refused.[32]

All peremptory instructions at the close of the testimony should be marked "given" or "refused," and parties should remember to have the instructons filed by the clerk. However, when at the close of the plaintiff's case a motion is made for a directed verdict, and it is copied in

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[25] Wages v. State, 210 Miss. 187, 49 So.2d 246 (1950); Goss v. State, 205 Miss. 177, 38 So.2d 700 (1949).

[26] Masonite Corp. v. Lochridge, 163 Miss. 382, 141 So. 758 (1932); Louisville & N. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348 (1910).

[27] Rose v. State, 170 Miss. 550, 155 So. 341 (1934).

[28] Holmes v. State, 192 Miss. 54, 4 So.2d 560 (1941).

[29] Miss. Code Ann. § 1530 (1912).

[30] Gulf and S. I. R. Co. v. Boswell, 85 Miss. 313, 38 So. 43 (1905).

[31] Shelby v. Brown, 24 So. 531 (Miss. 1899).

[32] Mississippi Public Service Co. v. Collier, 183 Miss. 271, 183 So. 379 (1938).

the record, and sustained by the court, it does not need to be marked by the clerk; likewise, if at the close of all the testimony a motion is made for a directed verdict, it need not be marked or filed by the clerk where the motion is copied into the record, and the record shows that the motion was sustained by the court.[33]

Instructions on the Weight of the Evidence

The judge shall not charge the jury as to the weight of the evidence.[34] Instructions should not be argumentative or emphasize certain portions of the evidence, and a refusal of such instructions is not reversible error. The court should never assume facts in giving instructions, and an instruction is erroneous if it assumes as true a disputed fact of vital importance.[35]

The weight, tendency, and effect of testimony is to be ascertained and settled by the jury. Their freedom of action on the subject should not be restrained by instructions from the court. The conviction of the court as to the tendency of testimony should not be impressed upon the jury any further than is done by permitting such testimony to go to the jury.[36]

It often happens that erroneous instructions are given which are cured by other instructions. An instruction often given but condemned by the Supreme Court is one which instructs the jury that the plaintiff is to prove every material allegation contained in the declaration by a preponderance of the evidence, and unless the plaintiff has proved every material allegation of the declaration, it is the duty of the jury to find for the defendant. In reviewing the validity of this instruction, our Court has said it is not proper for an instruction to refer a jury to the pleadings without setting forth some applicable principle of law; the law of the case should be set out in the instructions and the jury should not be invited to resort to the pleadings to complete the instructions and determine what the law is. The applicable law and facts of the case should be simply stated without referring the jury to the declaration. Such an instruction is unintelligible and obscure because, without any formula to guide them, the jury is referred to the declaration to determine what allegations of the declaration are material. The jury is entitled to have the law of the case, as given by the court, written out in full in the instructions.[37] Though our court has condemned such an in-

[33]North v. Delta Chevrolet Co., 188 Miss. 252, 194 So. 478 (1940).

[34]See note 29 supra.

[35]French v. Sale, 63 Miss. 386 (1885); Williams v. State, 32 Miss. 389 (1856); Edwards v. State, 47 Miss. 581 (1873); Poteria v. Brookhaven, 93 Miss. 774, 49 So. 617 (1909); Windfield v. Magee, 98 So.2d 130 (Miss. 1957); Wells v. Bennett, 100 So.2d 344 (1958)

[36]French v. Sale, 63 Miss. 386 (1885).

[37]Windfield v. Magee, 98 So.2d 130 (Miss. 1957).

struction, where it is clarified by other instructions, the Court has held the instruction to be harmless error.[38]

PEREMPTORY INSTRUCTIONS

At the conclusion of the plaintiff's testimony, or the testimony of the defendant, the court may grant a peremptory instruction. A peremptory instruction means taking all the evidence as true for either the plaintiff or defendant, the movant is entitled to judgment from the court without the jury passing on the evidence. Our State has reposed this power and duty to the trial judges to grant peremptory instructions and even to set aside verdicts. These powers have been recognized as an integral part of our State Constitution.[39] The statute which forbids judges to comment on the evidence or to give any instruction unless requested by the parties, leaves unaffected the judicial authority to direct a verdict. A peremptory instruction is analogous to a demurrer to the evidence, and is usually governed by the same rules. The peremptory instruction is never allowed unless the evidence is plainly and unmistakably insufficient to maintain the issue, or unless the court would feel constrained to set aside a verdict for the opposite party not warranted by the evidence.[40] Where the court feels no other verdict could reasonably have been allowed to stand, the judge should grant a peremptory instruction, and in determining the propriety of a peremptory instructon, the evidence is to be taken more strongly against the party who makes it.[41]

In determining the question of the propriety of a peremptory instruction and the court's action thereon, the evidence must be taken more strongly in favor of the opposite party. Every material fact which is in evidence and tends to be in the opposite party's favor must be taken as true.[42] In other words, the court cannot direct the verdict for either party when the evidence would authorize the jury to find for the other party.[43] When a peremptory instruction is granted, it is not necessary that the jury retire; the judge may enter the judgment without the jury's action.[44]

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[38]Southland Broadcasting Co. v. Tracey, 210 Miss. 836, 50 So.2d 572 (1951); Windfield v. Magee, 98 So.2d 130 (Miss. 1957).

[39]Jakup v. Lewis Grocery Co., 190 Miss. 444, 200 So. 597 (1941).

[40]Anderson v. Columbia Telephone and Telegraph Co., 86 Miss. 341, 38 So. 786 (1905).

[41]Wooten v. Mobile & Ohio Railroad Co., 89 Miss. 322, 52 So. 131 (1906); Clark v. Mosye, 48 So. 721 (Miss. 1909); Fletcher v. Sovereign Camp, W. O. W., 81 Miss. 249, 32 So. 923 (1902); American Trading Co. v. Ingram Day Lumber Co., 110 Miss. 31, 69 So. 707 (1915).

[42]Yates v. Houston & Murray, 111 Miss. 881, 106 So. 110 (1925).

[43]Taylor v. Desota Lumber Co., 137 Miss. 829, 102 So. 260 *modified*, 103 So. 82 (1925).

[44]Edwards v. Yazoo and M. V. R. Co., 112 Miss. 791, 73 So. 789 (1917).

Record on Appeal

The Statute states that all instructions properly marked and filed, shall be a part of the record on appeal without exception being taken.[45] The Rules of the Supreme Court provide that the right of review of any ruling of the trial court shall not depend upon the parties having made a motion for a new trial where the instructions are properly marked and made a record in the case.[46] The Statute provides in unmistakable terms that the clerk shall mark all instructions requested by either party or given by the court as being given or refused, as the case may be, and all instructions so marked shall be a part of the record on appeal without a bill of exceptions. Therefore, it is no longer necessary to except to the giving or the refusing of instructions during the progress of the trial, nor is it necessary to make them the ground of a motion for a new trial if properly marked by the clerk.[47] When instructions are properly marked and filed, the court treats them as though objected to and exceptions taken at the time it was "given" or "refused" by the court.[48]

Where an instruction is modified and corrected, the party should get his objection to the court's change of the instruction in the record, or have the court refuse to give the instruction. Otherwise, the instruction becomes a part of the record as an instruction of the court after the change is made and the instruction is marked by the clerk. In case the party does not object and get his objection in the record, he may ask for a bill of exceptions from the court.[49]

The proper form after the court marks the instruction "given" or "refused" is as follows: "Given and filed" or "Refused and filed" the ..... day of ..... (Mo.), 195.....

.....".[50]

Circuit Clerk

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[45]Miss. Code Ann. § 1530 (1942).

[46]Rules of the Supreme Court, R. 6; Coccora v. Vicksburg Light and Traction Co., 126 Miss. 713, 89 So. 257 (1921).

[47]Hodges v. Town of Drew, 172 Miss. 668, 159 So. 298 (1935); Sovereign Camp W. O. W. v. Sloan, 136 Miss. 549, 101 So. 195 (1924); Cox v. State, 141 Miss. 607, 107 So. 7 (1926).

[48]Cox v. State, supra note 47.

[49]Mississippi Central Railroad Co. v. Hardy, 88 Miss. 732, 41 So. 505 (1906); Colemen v. Yazoo and M. Valley R. Co., 90 Miss. 629, 43 So. 473 (1907); Louisville & N. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348 (1910).

[50]Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582 (1920), *sugg. of error overruled,* 86 So. 763 (1921).

POWER OF THE LAW COURT OVER ITS JUDGMENTS: (A) DURING THE TENURE OF THE TERM IN WHICH THEY ARE RENDERED; (B) AFTER ADJOURNMENT OF THE TERM AT WHICH THEY ARE RENDERED

*M. M. McGowan**

The authority to vacate or set aside its own judgments is inherently incident to all courts of record or of general jurisdiction. The right and authority being inherent in the court, no special statutory authority so to do is required. It is of common law origin.

As is stated in *Corpus Juris Secundum*: "During the term the power of the court is absolute and the court may even change its decision on the merits; accordingly, any consideration sufficient to move the equitable discretion of the court is ground for opening or vacating the judgment during the term."[1]

In spite of the above statement defining the court's power and the source of its power over its own judgments during and after the term at which they are rendered, it might appear paradoxical to follow with another general statement of law, to wit: That a court has no power to correct, amend, open or vacate a judgment after the expiration of the term.

However, the two general statements above are not actually contridictory due to the fact that the first deals with the inherent power of the court over its judgment and the second is a general statement of law protecting the finality of judgments as a necessary postulate of the law, and refers actually to the setting aside of judgments after the term. Reduced to its meaning which harmony dictates, it means that while the court has inherent power over its judgment, it can only be exercised under certain exceptional circumstances, and under conditions where not only discretion but desire can play no part. In fact, it is the purpose of this article to discuss those certain exceptional circumstances and conditions which constitute an exception to the rule.

Many of the states have statutes dealing with this specific subject; that is, the manner, method and conditions under which courts may set aside judgments after the expiration of the term at which they are rendered. Mississippi has no such statute specifically designed to accomplish any such purpose. However, we do have certain statutes which bear upon the subject and are related to it, and from the essence of which

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[1] 49 C.J.S., Judgments, § 266.

and provisions of which we are guided, in some measure at least, in determining when a judgment may be set aside.

The Statutes

I think at the outset these statutes ought to be referred to and briefly examined as to their content and as to the measure in which they affect the subject. These statutes are as follows:

First, Section 1670, Code of 1942, pertains to the correction of mistakes, miscalculations and errors connected with the entry of a judgment. It deals exclusively with mistakes and errors of calculation as well as findings, and is usually incident to some error made by the clerk in entering the judgment or translating the verdict of the jury into the final judgment. Under such conditions a judgment may be corrected and amended upon proper notice to the opposite party. One feature worthy of note in connection with this section and the rule of law applicable thereto is that there must be, somewhere among the court papers or the record in the case, some actual document from which the true facts may be gleaned, or else the matter must be clearly within the memory and understanding of the presiding judge.

Second, Section 1544 must be considered. This is our Statute of Jeofails, which is quite lengthy, and it is not necessary to set the same out. The purpose of the Statute of Jeofails, as is well understood by the members of the Bar of this state, is to save the validity of the final judgments of courts from the almost unavoidable entrance into the proceedings of certain deviations from absolute accuracy both in the pleadings and conduct of the trial. But for this statute few judgments would ever stand due to the lack of absolute metaphysical certainty in processes leading to a culmination in a final judgment of the court.

Third, Section 1547 deals with the subject. The title of this section is: "Judgments—When Final."[2] This section more nearly parallels the sections in other jurisdictions which deal specifically with the question of setting aside judgments. The theme of the section actually deals with the finality of the judgments of the court.

It is noted that Section 1547 makes a distinction in the nature of the

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[2]Miss. Code Ann. § 1547 (1942): "In actions founded on an instrument of writing showing the sum due, or on an open account, where a copy of the account is filed with the declaration, if judgment be rendered on demurrer, by confession, or by default, the clerk shall calculate the amount due for principal and interest, and judgment shall be entered therefor and be final, if not set aside during the term. And in all actions where the sum due does not so appear, and in all actions sounding in damages, if the defendant does not plead, interlocutory judgments may be taken, on which writs of inquiry shall be awarded, which may be executed at the same term either by the jurors attending court or by the judge, at the option of the plaintiff. And after a writ on inquiry shall be executed, and judgment rendered thereon by the court, the same shall not be set aside unless good cause be shown therefor on oath; and in such case the defendant shall plead immediately, and the plaintiff shall not thereby be delayed of his trial."

basic cause of action sustaining the judgment. If the judgment be upon a writing showing "the sum due, or on an open account, where a copy of the account is filed with the declaration . . ." the judgment shall not be set aside except at the term of court at which it was rendered. The second part of the section deals with unliquidated claims where the amount of judgment, following an interlocutory or default judgment as to liability, has to be determined by a writ of inquiry. The statute further provides that after a writ of inquiry and final judgment, the judgment shall not be set aside unless good cause be shown therefor on oath. This part of the statute says nothing about whether such action to set the judgment aside would have to be brought during term time or not. There is a clear implication in the statute that a distinction is sought to be made between a suit for a sum due on an open account or liquidated debt, and a suit sounding in tort where damages are unliquidated and have to be settled by writ of inquiry pursuant to an interlocutory judgment fixing liability. This distinction was most strenuously argued in a case in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and was efficient to avoid the setting aside of the judgment, and was persuasive against setting aside a judgment which, under all the conditions and circumstances, might otherwise have been set aside.

However, regardless of the apparent implication which arises from the reading of the statute, a fair appraisal of the legal aspects involved leads to the conclusion that all judgments are in the same category after the expiration of the term at which they are rendered. They cannot be set aside and the court has no jurisdiction over them as a general proposition except when the prevalence of similar conditions authorize the setting aside of the judgment later to be discussed.

Fourth, Section 1646, is the section providing for new trials. It is true that the commentaries generally do not classify statutory provisions which grant new trials as statutes properly within the purview of the subject here under discussion. However, it appears that since the vacating and setting aside of judgments after the expiration of the term due to some of the justifiable reasons to be noted, a new trial is often granted, this section is properly classified as a statute applicable to the question under discussion.

With these preliminaries and statements of our statutory provisions, we will turn now to a discussion of the setting aside of judgments as defined in the first portion of the classification; that is, judgments rendered during the term time. As stated above, the power of the court over its judgments during term time is said to be absolute. The court may set aside a judgment and grant a new trial, or the court may set aside a judgment and reinstitute a previously declined motion for a directed

verdict and enter a final judgment thereupon. By strict analysis, it is hard to determine what other practical results could follow the setting aside of a judgment during the term time. It is for this other reason that it seems that our statute on granting new trials is properly relegated to the topic herein discussed. In fact, various conditions may arise to prompt the court to take the action culminating in one of these results. One, of course, would be excusable neglect on the part of litigant or counsel in pursuing the cause or attending to its conduct in the court. Trial judges are oftentimes importuned and heavily pressured to set aside judgments where counsel, for some excusable reasons, has failed to appear on the appointed day of the trial of the cause and has suffered a default. Dealing with such cases is one of the heaviest burdens that a trial judge must bear. His desire to be generous and lenient is often met with the challenge that litigants and sometimes counsel have a vested interest in their rights of action and in the processes of law available to them in the procurement thereof.

CONDITIONS AND CIRCUMSTANCES WARRANTING THE SETTING ASIDE OF A JUDGMENT AFTER EXPIRATION OF THE TERM

The conditions and circumstances warranting the setting aside of a judgment after the expiration of the term in our jurisprudence, with some exceptions, conform to general rules prevailing in other jurisdictions and the conclusions reached in the commentaries such as *Corpus Juris Secundum* and *American Jurisprudence,* as well as the case law texts.

One more word with reference to the setting aside of judgments during term time might be appropriate. The matter lies so exclusively within the discretion of the court that the subject does not merit too extensive exploration. In such cases where the action of the court can be motivated by nothing other than the natural desire to see justice done, the subject matter is quite distinctly removed from the rather stern rules governing the finality of judgments.

Although as will be pointed out later the equity courts can in some cases relieve from judgments where the law courts cannot, it might be well to state here that the rule with reference to setting aside money judgments after the expiration of the term is the same in our equity jurisprudence as it is in the law courts. Mississippi is one of the few jurisdictions where separate equity and law courts are maintained. While the general theory of equity jurisprudence had its inception centuries ago in the search for relief from the strictures and rigidity of the common law courts of England, still in our practice a decree, particularly a money decree, has exactly the same degree of finality as that of a

judgment in the law court. In *Guest v. Smith*,[3] Judge Anderson said that a commuted lump sum divorce alimony award could not be set aside after court term because the right to the money became vested. He quoted authorities from New York, Nebraska and Illinois. Of course, this theory has no application where the equity court, due to the essential nature of the cause, retains jurisdiction of the matter involved. Neither does it have application to relief in chancery from certain hardships beyond the reach of the law courts.

The Decisions

In *Lamar v. Houston*,[4] the court held that a judgment or decree might be attacked for fraud on the jurisdiction of the court, and that the attack might be made either directly or collaterally. On this point the opinion quotes *Plummer v. Plummer*,[5] *Christian v. O'Neal*,[6] *Richardson v. Brooks*,[7] and a number of more recent cases.

It is well to note, however, that in the *Lamar* case[8] the emphasis placed upon the words "fraud upon the jurisdiction of the court" should be carefully observed. The decision reaffirms the well-established doctrine in this state that judgments may not be attacked after the expiration of the term except under the most serious circumstances, or such as when the judgment is absolutely void or a fraud upon the jurisdiction of the court has been practiced.

Furthermore, it is noteworthy that in the opinion in the *Lamar* case the relief sought was denied on account of laches, although it was ruled the judgment was void because of fraud on the jurisdiction of the court.

In the case of *Alabama and Vicksburg Railway Company v. Bolding*,[9] Judge Campbell opens his opinion with the following:

> "The only ground on which the motion to vacate the judgment could be sustained is that it is void. Mere irregularities—questions of error or no error—such as might cause a reversal on appeal, and for which the judgment would not be pronounced void, cannot be availed of by motion before the court which rendered the judgment. It cannot, at a term subsequent to the judgment, reverse or annul it for mere errors of law in the proceedings. Only this court can do that."

The above quotation from Judge Campbell's opinion is a fair and

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3100 Miss. 457, 56 So. 166 (1911).
4182 Miss. 260, 184 So. 293 (1938).
537 Miss. 185 (1859).
646 Miss. 669 (1872).
752 Miss. 118 (1876).
8Lamar v. Houston, supra note 4.
9669 Miss. 255, 13 So. 844 (1891).

comprehensive statement of the fundamental rule in Mississippi governing the vacating and setting aside of judgments after the term expires.

A judgment will be set aside after the expiration of the term where there has been no service of process. Due process of law under the Fifth and Fourteenth Amendments makes the proper service of process an indispensable element to the procuring of a valid judgment. Judge Campbell in the *Bolding*[10] case so ruled. In a case in the First Judicial District of Hinds County, Mississippi, a judgment rendered at a former term was set aside on account of the fact that the summons was handed to an employee of the corporation unauthorized to receive process.

An example of the strictness of proof that the judgment must be absolutely void before a law court at a subsequent term may set it aside is found in the case of *McIntosh v. Munson Road Machinery Company*.[11] This case illustrates the degree of hardship that the court would tolerate in order to protect the finality of judgments in the law courts. The judgment was in the county court, by default, with an allegation that no answer had been filed. The reported case arose out of a proceeding against the sheriff to exact a penalty for not levying an execution. It appears that at a subsequent term of the county court the judgment was set aside when the court was advised of the fact that a general issue plea had been filed, but its filing had not been noted on the docket and it had been lost from the court papers. The plaintiff proceeded by motion under the statute against the sheriff for failure to levy the execution. Upon denial of the petition by the county court and circuit court for the reasons above alleged, the appeal was taken to the Supreme Court by McIntosh. The court ruled, quoting a number of earlier decisions, that a default judgment where there is a plea on file is an erroneous judgment and would be reversed upon appeal to the Supreme Court, but that the county court had no right at a subsequent term to arbitrarily set aside a judgment, good and valid on its face, for this reason. The court used this language, "But our attention has not been called to a single case in which a judgment has been condemned as absolutely void" (referring to a case where judgment by default was taken with a plea on file). The court went so far as to say that while an equity court could have relieved the hardship, the law court could not; and that while the Supreme Court could have relieved while the time for appeal lasted, the trial court granting the judgment could not. This opinion continues further as follows:

> ". . . but, where a court has jurisdiction of the subject matter and of the parties, and renders a judgment at a term of court, it is

[10]Alabama & Vicksburg Railway Co. v. Bolding, ibid.
[11]167 Miss. 546, 145 So. 731 (1933).

without power to set aside such judgment after the term of court has elapsed. See Sagory v. Bayless, 13 Smedes & M. 155; Barker v. Justice, 41 Miss. 240; Shirley v. Conway, 44 Miss. 434; Wiggle v. Owen, 45 Miss. 691; Lane v. Wheless, 46 Miss. 666; Beard v. McLain, 117 Miss. 316, 78 So. 184; Evans v. Kings-Peoples Auto Company, 135 Miss. 194, 99 So. 758; and Bates v. Strickland, 139 Miss. 639, 103 So. 432."[12]

In essence the Court further held that, even if the proof did show on a subsequent hearing at the succeeding term that a plea was on file, the Court adjudicated that none was on file and the proceedings were regular on their face and that the judgment contained "everything necessary to show jurisdiction of the court and proper rendition of the judgment."

In *Strain v. Gayden*,[13] it was held that so far as the principle of finality is concerned, the judgment taken by default is the same as any other judgment.

A case that should be read in close parallel with the case of *McIntosh v. Munson*,[14] is the more recent case of *Gardner v. Price*.[15] Default judgment was taken in the justice court and appeal taken to the circuit court where default judgment was again taken. The cause was appealed to the Supreme Court, where it was dismissed when it became apparent that the appeal from the justice court to the circuit court was taken too late. The case at that time was styled *Gardner v. Cade*.[16] The circuit court entertained a motion, upon remand, to dismiss the case and ordered its dismissal. To avoid execution from the judgment now back in the justice of the peace court, the defendants sought an injunction in the chancery court, which ultimately resulted in the dissolution of the injunction and dismissal of the suit. Upon appeal to the Supreme Court under the style above stated, *Gardner v. Price,* a divided court reversed the Chancellor and remanded the cause to the chancery court. The basis for the injunction suit was that the judgment had been fraudulently procured in the justice of the peace court and in violation of an agreement with the justice of the peace that the case would not be tried upon the date it came on for hearing, but would be continued on account of the prevalent custom in Humphrey's County whereby all justice of the peace cases were continued to the end of a circuit court term, which was then in session. In reversing the case, a majority of the Justices were persuaded by what is said to be one of the causes justifying a reversal after the expiration of the term—where the Judge of the court made certain statements which led the litigant or counsel to believe that the

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[12]McIntosh v. Munson Road Machinery Co., ibid.
[13]197 Miss. 353, 20 So.2d 697 (1945).
[14]McIntosh v. Munson Road Machinery Co., see note 11 supra.
[15]199 Miss. 809, 25 So.2d 459 (1946).
[16]190 Miss. 505, 200 So. 720 (1941).

cause would not be tried at the current term. This principle of law is set forth in *Corpus Juris.*[17] The extended comment made concerning this case is justified by the belief, considered most significant, that the attack upon this judgment prevailed due to the fact that it was through the avenue of the equity court rather than the law court. In other words, following the parallel of *McIntosh v. Munson*[18] the chancery court did that which the law court could not and would not have done. Be that as it may, a very strong dissent was filed by Justice Roberds and was joined in by Chief Justice Smith. Justice Roberds said it was an attack upon the well-established rule of what he termed "the finality of judgments."

It is apparent that a judgment will be reversed where the declaration states no cause of action. *Wilson v. Terry,*[19] a case originating in the Circuit Court of the First Judicial District of Hinds County, is a case in point. An amendment was made bringing in a defendant, the defendant who prosecuted the appeal. But the amendment failed to state a cause of action against him. It merely made him a "defendant". When default judgment was taken and a writ of inquiry requested, the court, relying upon the accuracy of the pleaders, made no personal examination of the declaration and amendment thereto to see if a cause of action was stated. After final judgment by default and writ of inquiry, the case was removed to the Supreme Court where the cause was reversed on account of the fact that no cause of action was charged against the defendant who appealed. It is true the case was remanded; however, there is some doubt that this case falls within the category of cases mentioned by Judge Campbell in *Alabama and Vicksburg Railway Company v. Bolding,*[20] wherein he stated that only the Supreme Court could relieve a judgment where the judgment was irregular but not pronounced void. Where the declaration states no cause of action, it appears logical that the Circuit Court of the First Judicial District of Hinds County, upon proper applicaton, might have set the judgment aside even after the expiration of the term at which it was rendered if the judgment was by default. However, the writer takes no stand thereto, but thinks it more appropriate to merely raise the question for consideration.

Attention should be called to the case of *Duvall v. Duvall,*[21] which is a suit in chancery for separate maintenance. In that decision it is said, "Where the court has jurisdiction of the parties and the subject matter, a judgment render on a complaint that does not state a good

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1734 C.J., Judgments § 518(c), p. 299.
18McIntosh v. Munson Road Machinery Co., see note 11 supra.
19218 Miss. 411, 67 So.2d 387 (1953).
20Alabama & Vicksburg Railway Co. v. Bolding, see note 9 supra.
2180 So. 2d 752 (Miss. 1955).

cause of action is not void and subject to collateral attack . . . ." This is a suit in chancery under the laws governing divorce, alimony and separate maintenance, and I do not believe it could be absolutely controlling as to the case quoted above, a suit at law where the declaration wholly fails to state any cause of action.

One of the most recent cases on the subject is the case of *Road Material and Equipment Co. v. Arch McGowan*.[22] In this cause the motion was made some four years after judgment was rendered in the Circuit Court of the First Judicial District of Hinds County to set aside a money judgment which had been entered in na replevin action. The circuit court set the judgment aside as being absolutely void on account of no power in the circuit court to render a money judgment in such action. The money judgment was taken by default in 1951 and was set aside upon motion in 1955. The opinion is rather exhaustive, many cases and texts being quoted therein. Under the sixth and seventh syllabus Judge Ethridge stated:

> "The Circuit Court had the power to later amend its 1951 judgment so as to remove therefrom the provisions awarding plaintiff a money judgment against defendant. This power exists as part of the inherent power of the court to correct invalid and void provisions in its judgments. The general rule is stated in 49 C. J. S., Judgments, Section 266, page 479, as follows: 'It has been held, without reference to the term or time at which the judgment was rendered, that the inherent power of a court to open or vacate its judgments may be exercised when the judgment is void, or when there has been a procedural or jurisdictional defect or where a question of fraud or other collateral issue is raised.' "

In the case of *Harper v. Barnett*,[23] Judge Whitfield said:

> "The court doubtless had the power, after the term, aside from Section 940, Code of 1892, to vacate the judgment on the ground that it was obtained by fraud or that 'the judgment as entered on the record of the court did not accord with that intended to have been entered.' "

The opinion further holds that what is termed a common law petition to vacate the judgment after the expiration of the term may be entertained and acted upon by the court where it is charged that there has been a "fraud upon the jurisdiction of the court." The opinion further holds that parol proof may be taken thereunder, whereas no parol proof may be taken under Section 940, Code of 1892, which is the section

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[22] 91 So. 2d 554 (Miss. 1956).
[23] 16 So. 533 (Miss. 1895).

now numbered 1670 in the Code of 1942 pertinent to the correction of errors in judgments. In the *Barnett* case, although the court ruled as a general principle of law that such an action might be maintained, the relief was denied in the petition to the Supreme Court and the cause was reversed. The charge of fraud was that there was an agreement among counsel that the judgment in the case would go against the defendant, but that the bondsmen would be relieved.

In connection with this subject, it would be appropriate to make some mention of the writ of error coram nobis. The resort or attempted resort to this writ in the past has yielded little assistance to the applicants. Other than *Howie v. State*,[24] I have been unable to find any case wherein profit was derived therefrom by the applicant. By statute, coram nobis in its original form was removed from the criminal practice. A system was established by said act whereby the writ could not issue except upon authority from the Supreme Court. In *White v. State*,[25] the Court held that the writ of error coram nobis was not available to obtain a new trial on the ground of newly discovered evidence. In *Lott v. Illinois Central Railroad Company*,[26] Chief Justice Smith in referring to the relief sought by coram nobis stated:

> ". . . a relief which once could be granted only on the archaic writ of error coram nobis, which now can be granted in response to a simple motion or petition setting up the necessary facts."

In the *Lott* case, numerous cases in support of this pronouncement are cited.

As stated previously, the general rules set down in the commentaries with reference to the subject under discussion are, with some exceptions, fairly conformable to the judicial law of our state. For instance in *American Jurisprudence*[27] a distinction is made between default judgments and judgments resulting from a trial on the merits. No such distinction exists as recognized in our law when the proceeding has to do with setting aside of a judgment after the conclusion of the term of court.[28] However, the fact that the judgment is by default rather than trial on the merits is extremely persuasive when the question under consideration is the setting aside of a judgment during term time.

In this article the writer has placed emphasis upon the decisions or judicial law of our State. It is believed that the subject matter here under discussion presents a situation, often encountered in legal research, where the laws of other jurisdictions are not practically helpful.

24121 Miss. 197, 83 So. 158 (1919).
25159 Miss. 207, 131 So. 96 (1930).
26193 Miss. 443, 10 So. 2d 96 (1942).
2730A Am. Jur., Judgments, § 632.
28Strain v. Gayden, see note 13 supra.

No effort has been made to carefully examine and report upon every case bearing upon the subject. Space, of course, would not permit this. An effort has been made to select those particular cases which it is believed cast the most light upon the subject, and from the consideration of which, each in conjunction with the other, some definite conclusions may be reached.

The commentaries contain a discussion of a wide range of things that would be efficient to set aside a judgment in a law court after the conclusion of the term. These consist of such subjects as perjury, collusion, duress, accident or surprise, unavoidable casualty or misfortune, mistake, etc. I find no case in our jurisprudence where any of these things, taken alone, would justify the setting aside of a law court judgment after the term is concluded. As previously stated, many states have special statutes dealing with this subject matter, but Mississippi does not.

The subject of fraud, as a general term, presents unusual difficulties in this connection. Both our decisions and the commentaries hold that fraud must be extrinsic and not intrinsic; that is, it must not be a matter drawn within the arena of the trial during its progress. It is the conclusion of this writer that after a careful consideration of the cases herein quoted and believed to be controlling over the subject matter in our jurisprudence, only fraud upon the jurisdiction of the court is efficient to render a judgment void, and therefore subject to be set aside.

In an article dealing with such a subject as is here under discussion, at the end thereof it should be possible to point to certain definite conclusions, practical in nature and comprehensive in understanding. The writer makes the following conclusions in the belief and hope that they are reasonably derivable from the composite of the judical law of the state as touching the subject under discussion:

A. That a court of law has absolute control over its judgments and proceedings during the term time and may change, alter or set aside the same within its discretion;

B. That after the expiration of the term at which the judgment was rendered the law court cannot open, vacate, modify or set aside its decisions unless, (1) the judgment is absolutely void for fraud on the jurisdiction of the court; (2) the rendition of said judgment was without and beyond the powers of the court to render; or, (3) the judgment was entered without process or notice served upon the defendant as required by due process of law.

C. That neither errors of fact or law, irregularities, inadvertence, mistake of law or fact or any other matter which would render the judgment voidable on appeal would be efficient to set the judgment aside.

D. That courts of chancery may relieve the hardships of the judg-

ments of law courts under conditions where the law courts themselves cannot and will not do so.

CONCLUSION

The finality of judgments is an important element of our impersonal law; that is, the basic law upon which our government and society rest, the English and American jurisprudence and law of property and individual freedom. The oft-quoted phrase, "Ours is a government of laws and not of men" is but another way of stating that our laws are impersonal and constitute a self-subsisting functional entity. When the social philosophies encroach so far into the field of the law that we have judges who turn their back upon the sometimes considered hard strictures of the law and set about to do "the right thing," then we are truly departing from the fundamentals and are well upon the road to the loss of our basic property rights and freedom that have been wrought from a thousand years of travail by our Anglo-Saxon ancestors. Paradoxically enough, the judge who deserts the fundamentals of the law and seeks to do "the right thing" is a close forerunner of the tyrant.

EXTRAORDINARY AND SPECIAL STATUTORY ACTIONS

*Francis T. Zachary**

A. EJECTMENT

The possessory action of Ejectment is outlined in minute detail in the Code of 1942, and is contained in Chapter One of Title 7, beginning with Section 778.[1] Any complete discussion of the law of Ejectment would, of necessity, be too voluminous to be treated in an article of this nature. Therefore, this discussion shall be limited to the general meaning and application of the statutory action in Mississippi, together with a short review of its history, as well as a discussion of some of the problems of procedure which will be encountered in its use.

Origin or History

The possessory action of Ejectment, dealing with the recovery of possession of specific real property, is a creature of the law courts of England, and originally the action was to recover damages for the wrongful ejectment or ouster of one who held a lease or a term of years in a specific parcel of realty. At that time, damages only could be recovered, the measure of which was the mesne profits. However, in recent times, ejectment has become an effective remedy for the speedy trial of the right to possession of special real property, including freehold estates as well as terms for years, and in a great many jurisdictions ejectment is used to settle the title and establish the right to property.

Specific Statutory Action in Mississippi

The action of ejectment in Mississippi is a statutory remedy,[2] and may be maintained in all cases where the plaintiff is legally entitled to possession of the land.[3] Originally ejectment was a purely possessory action, and, although some modern statutes have enlarged the scope of the action to include trial of the title and recovery of mesne profits and damages, it remains essentially a possessory action.[4]

Ejectment in Mississippi is not intended to be an abstract method of trying questions of title, although it is necessary to determine the

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[1]The Mississippi Supreme Court in Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947) stated that this entire chapter was complete in itself and that all procedures there outlined must be followed in order to maintain this action for even in its abridged form it is sui generis.

[2]Burns v. Allen, note 1 supra.

[3]Miss. Code Ann. § 778 (1942).

[4]Gunter v. Viverett, 193 Miss. 206, 8 So.2d 247 (1942).

title to the property, or at least to decide whether the plaintiff has a right of immediate entry or possession as against the particular defendants.[5] Section 825 of the Code of 1942, allows a plaintiff to recover mesne profits and damages in the action of ejectment; however this is optional, and he may bring a separate action to recover mesne profits after recovery in the ejectment suit.[6]

Mississippi is one of the few remaining jurisdictions which disguishes between law and equity, so it is important to observe that ejectment is cognizable at law and not in equity. At common law an equitable defense was not available in an action of ejectment;[7] however, our Supreme Court has held that where a defendant has sufficient equitable title to draw to it the legal title, the legal title in the plaintiff will not prevail.[8] The action is designed to enforce legal rights, and the plaintiff must have a legal right to the possession of the property described in his declaration. The only relief that may be granted him upon his pleadings is the possession of the property and possibly damages for its detention. There can be no abstract decision concerning the title, nor can equitable relief be granted in this action in Mississippi.

Comparing Statutes and Common Law

At common law, four elements were necessary to support an action in ejectment, namely: title, lease, entry and ouster.[9] However, our Statute has dispensed with the consent rule and all other fictions which were necessary in the common law action of ejectment.[10] The entry by the defendant and the ouster of the plaintiff are no longer prerequisites if it appears that the plaintiff has possessory title to the property and possession is withheld by the defendant; the proceedings are to be a trial of the title and not of an actual ouster unless it is necessary.[11] To recover possession of real property by means of ejectment, the plaintiff must have title with the present right of continued possession, with the right to maintain continued possession as well as the present right to possession.[12] But it was held in *Anderson v. Moore*,[13] that adverse possession gives the possessor and those in his chain of title sufficient legal title to recover in ejectment against a mere intruder who has no title. It has also been held that a mere right of way or easement does not authorize exclusive possession.[14]

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[5]Acoff v. Roman, 172 Miss. 181, 159 So. 555 (1935).
[6]Emrich v. Ireland, 55 Miss. 390 (1877); Miss. Code Ann. § 825 (1942).
[7]Morgan v. Blewitt, 72 Miss. 903, 17 So. 601 (1895).
[8]Hytken v. Bianca, 186 Miss. 323, 188 So. 311 (1939).
[9]18 Am. Jur., Ejectment § 7.
[10]Miss. Code Ann. § 785 (1942).
[11]Miss. Code Ann. § 779 (1942).
[12]Griffin v. Sheffield, 38 Miss. 359 (1860); Wolfe v. Doe, 13 Sm. & M. 103 (Miss. 1849); Doe ex dem. Reynolds v. Ingersoll, 11 Sm. & M. 249 (Miss. 1848).
[13]84 Miss. 400, 36 So. 520 (1904).
[14]Lott v. Paine, 82 Miss. 218, 33 So. 948 (1903).

Fortunately, this remedy is explained in such detail in the statutes[15] that it is the opinion of the writer that if the statutes are explicitly followed, there is little room for error.

In Mississippi, any person who is either an actual occupant or is claiming title and interest may be made a defendant; or if the premises are unoccupied, any person exercising any act of ownership or control or claiming any title or interest may be made a defendant.[16] Non-resident defendants may be joined in this action by process by publication, or in the event of death, any legal representative who is a non-resident may be joined in a like manner.[17] Tenants are required to give notice to landlords,[18] and all life tenants, reversioners or remaindermen have the right to be admitted to defend their right and title.[19] If a tenant does not notify his landloard of the ejectment proceeding, the tenant is liable for three years rent on the premises, which may be rocevered in a separate action at law.[20] A default judgment or surrender of the premises by the tenant does not prejudice the rights of any reversioner or remainderman.[21] Since all common law fictions and the consent rule have been abolished in Mississippi by statute,[22] the action is commenced by simply filing a declaration, the form for which is set forth in Section 790 of the Code of 1942, in the name of the person claiming the right to possession, with a sufficiently detailed description of the premises[23] as will distinctly apprise the defendant of the location of the property so that possession may be delivered to the claimant.[24] Furthermore, the plaintiff may claim only an undivided interest therein, but he must state this in his declaration.[25] If he claims more than that to which he is entitled and at the trial fails to show that he is entitled to possession of the whole, then he may recover that to which he has proved title.[26]

After the declaration is filed, a summons,[27] the form for which is set forth in Section 791 of the Code of 1942, will issue for the defendant in the same manner as in personal actions.[28] The normal plea of the

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15Miss. Code Ann. §§ 778-830 (1942).
16Miss. Code Ann. § 780 (1942).
17Miss. Code Ann. § 781 (1942).
18Miss. Code § 782 (1942).
19Miss. Code Ann. § 783 (1942).
20See note 18 supra.
21Miss. Code Ann. § 784 (1942).
22Brewer v. Beckwith, 35 Miss. 467 (1858); Miss. Code Ann. § 785 (1942).
23Lum v. Reed, 53 Miss. 73 (1876); Lovejoy v. McDibben, 113 Miss. 369, 74 So. 281 (1917); Lazar v. Caston, 67 Miss. 275, 7 So. 321 (1889). The court held in this case that a description in the following form was insufficient: "North part of the southwest quarter of lot two."
24Miss. Code Ann. § 785 (1942).
25Ibid.
26See note 24 supra.
27Emmons v. Frazier, 221 Miss. 241, 72 So.2d 444 (1954); Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947).
28Miss. Code Ann. § 786 (1942); Burns v. Allen, 202 Miss. 240, 31 So.2d 125 (1947). This case held that Section 786 of the Code of 1942 refers only to the manner of issue,

defendant in the statutory action of ejectment is "Not Guilty," which, if filed within proper time and in the manner required for a personal action, will allow the defendant to introduce any evidence which constitutes a lawful defense to the action.[29] The defendant may also defend only a part of the premises, but if he does, this must be set forth in the plea.[30] If the plaintiff demands mesne profits, it is necessary for him to demand and specify the amount of money claimed for the use and occupation of the premises by the defendant from the date of the ouster.[31] Actions to recover mesne profits are governed by the six year statute of limitation.[32] The statutes set forth the form for all existing pleadings: a plea of a tenant defending the whole claim[33] or only a part;[34] the landlord defending separately from the tenant;[35] a plea by any other person than the landlord;[36] a plea by the landlord and tenant defending jointly;[37] and a plea by other than the landloard defending jointly with the tenant.[38] If the defendant desires to deny that he was, at the time the action was commenced, in possession of any part of the premises or that that he was exercising any act of ownership over the property or claiming any title thereto, or any interest therein, he may do so by a special plea.[39] A plea of the general issue and a special plea cannot be made, as to the land, in the same action and the court will cause one or the other to be stricken, as no issue can be presented while both pleas remain.[40] But if he files a special plea, the title of the plaintiff shall be admitted and the only question at the trial shall be in relation to the facts so specially pleaded.[41] Adverse possession of a part of the premises will not be considered as possession of the whole.[42] A plea of "Not Guilty" by the defendant for the purposes of this action is taken as an admission that he was in possession of the premises for which he defends at the time of the commencement of the action.[43] Judgment by default may be taken and a writ of possession issued thereupon with costs paid by the

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execution and return of a summons and therefore does not impair the effect of Sections 789 and 791 of the Code of 1942.

[29]Bernard v. Elder, 50 Miss. 336 (1874); Miss. Code Ann. § 787 (1942).

[30]Miss. Code Ann. § 787 (1942).

[31]Miss. Code Ann. § 790 (1942).

[32]Dean v. Tucker, 58 Miss. 487 (1880).

[33]Miss. Code Ann. § 792 (1942).

[34]Miss. Code Ann. § 793 (1942).

[35]Miss. Code Ann. § 794 (1942).

[36]Miss. Code Ann. § 795 (1942).

[37]Miss. Code Ann. § 796 (1942).

[38]Miss. Code Ann. § 797 (1942).

[39]Bernard v. Elder, 50 Miss. 336 (1874); Miss. Code Ann. § 798 (1942).

[40]Powell v. Watson, 66 Miss. 176, 5 So. 513 (1888); Hutto v. Thornton, 44 Miss. 166 (1870); see also Town of Scranton v. Bosarge, 19 So. 194 (Miss. 1896).

[41]See note 39 supra.

[42]Ibid.

[43]Powell v. Watson, note 40 supra; Bernard v. Elder, note 39 supra; Miss. Code Ann. § 799 (1942).

defendant.[44] The plantiff may discontinue the action as to any or all of the defendants by making application to the court to that effect and by paying the costs.[45] In like manner, one of several defendants may retract his plea and thus admit the action of the plaintiff and if no other party defends for that portion, the plaintiff may have judgment entered for that portion.[46] It is interesting to note that although an abstract of title is not necessary for the filing of an action of ejectment, after issue is joined, either of the parties may demand, in writing, a bill of particulars of his opponent's claim or his specific title.[47] This bill of particulars usually contains an outline of the documentary evidence expected to be used and statements of the substance of any and all instruments which might be lost, and it shows how and where title is claimed.[48] The Mississippi Supreme Court has ruled that once a bill of particulars has been requested and filed, the parties are confined to those matters specified in their bill of particulars of title,[49] but the court may allow either party to amend his bill when good cause is shown.[50] If a party should fail to furnish a bill of particulars, after being duly and legally called upon therefor, then he should not be permitted to introduce evidence at the trial.[51]

Either party in an ejectment suit has the right to demand a survey and may apply to the clerk of the court to issue a commission for this purpose. Any surveyor may report the same under oath to the court after the opposite party has had five days notice at the time of making of the survey.[52] If it is pronounced that in the judgment of the court the survey was necessary in order to properly try the action, then the costs of the survey may be included in the court costs.[53]

Since ejectment is an unusual action, the death of either party does not abate the action, but it may be continued by those legally entitled to continue such action under the statute.[54] Our statutes set forth specifically what is to be done to revive a suit in all death situations. The situations are set forth in Sections 807 through 815 of the Code of 1942, and the cases there annotated. In the trial of the action of ejtctment, the

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44Decell v. McRee, 83 Miss. 423, 35 So. 940 (1904); Miss. Code Ann. § 800 (1942).
45Miss. Code Ann. § 802 (1942).
46Buie v. Clay, 127 Miss. 719, 90 So. 446 (1922); Miss. Code Ann. § 803 (1942).
47Miss. Code Ann. § 804 (1942).
48Mitchell v. Tubb, 107 Miss. 221, 65 So. 216 (1914).
49Smith v. Whittington, 112 Miss. 759, 73 So. 785 (1917); Goforth v. Stingily, 79 Miss. 398, 30 So. 690 (1901).
50Goforth v. Stingily, note 49 supra; Summers v. Brady, 56 Miss. 10 (1878).
51Early v. Long, 89 Miss. 285, 42 So. 348 (1878).
52Lenoir v. People's Bank, 87 Miss. 559, 40 So. 5 (1906); Cannon v. Yarbrough, 127 Miss. 186, 89 So. 911 (1921); Miss. Code Ann., § 805 (1942).
53Miss. Code Ann. § 805 (1942).
54Miss. Code Ann. § 806 (1942).

burden of proof,[55] defenses,[56] admissibility and sufficiency of evidence,[57] and general procedures are substantially in accordance with the rules pertaining to other trials at law.

Questions concerning mesne profits[58] and compensation for improvements[59] are questions for the jury, and they may find the actual cash value of the improvements, taxes, mesne profits, etc., which findings the jury may set-off, one against the other, and announce accordingly in their verdict.[60] A judgment in an ejectment suit is res adjudicata as to the parties in the suit, but a person suffering under a disability at the time of judgment shall have three years, after removal of the disability, in which to commence an action.[61] A judgment rendered against a life tenant, however, does not bar an appeal by the reversioner or remaindermen during the tenant's life or after his death.[62]

The judgment in an ejectment suit, together with a certified copy of the declaration, the writ, the plea and answer, if any, and other papers in the suit may be recorded in the proper Land Deed Records in the county where the land is situated, and may be indexed as a deed from the unsuccessful party to the party who obtains the judgment.[63]

B. UNLAWFUL ENTRY AND DETAINER

The civil remedy for the recovery of the possession of premises, granted for the unlawful entry and detainer of real property, is of statutory origin and is covered by Sections 1033-1058 of the Code of 1942. The previously discussed subject of ejectment is an effective remedy for the speedy trial of the *right* to possession of specific real property, but the special statutory action of unlawful entry and detainer is the civil remedy for recovery of *possession of specific premises.* Orginally the common law conceded to any party with title to land and the legal right of entry thereon the right to use actual force to recover its possessions; therefore, the statutory action of unlawful entry and detainer was unnecessary.

55Goforth v. Stingily, 79 Miss. 398, 30 So. 690 (1901); Archer v. Helms, 70 Miss. 874, 12 So. 702 (1893); Davis v. Davis, 68 Miss. 478, 10 So. 70 (1891).

56Larson v. Larson, 82 Miss. 116, 33 So. 717 (1903); Graham v. Warren, 81 Miss. 330, 33 So. 71 (1902); Sintes v. Barber, 78 Miss. 585, 29 So. 403 (1901); Bolton v. Roebuck, 77 Miss. 710, 27 So. 630 (1900).

57Maxwell v. Mississippi, 95 Miss. 466, 48 So. 610 (1909); Illinois Central R. Co. v. Baldwin, 77 Miss. 788, 28 So. 948 (1900).

58Emrich v. Ireland, 55 Miss. 390 (1877); Bell v. Medford, 57 Miss. 31 (1879); Pass v. McLendon, 62 Miss. 580 (1885).

59Demourelle v. Piazza, 77 Miss. 434, 27 So. 623 (1900); Pass v. McLendon, 62 Miss. 580 (1885); Johnson v. Futch, 57 Miss. 73 (1879); Gaines v. Kennedy, 53 Miss. 103 (1876).

60Miss. Code Ann. §§ 825, 826 (1942).

61Melsheimer v. McKnight, 92 Miss. 386, 46 So. 827 (1908); Miss. Code Ann. § 829 (1942).

62Miss. Code Ann. § 828 (1942).

63Miss. Code Ann. § 830 (1942).

This remedy was concurrent with such possessory actions as trespass, ejectment or assize of novel disseisin, and was available to any person disseised until his right of entry was tolled.[1]

The privilege of using force, allowed by the common law to persons turned out of possession, was found to be prejudicial to the public peace and welfare, for many persons used violent methods to reinstate themselves. Therefore at an early date there were statutes passed in England to restrain people from the use of these violent methods. The first was the Statute of 5 Richard II (1381).[2] Eventually, the Statute of 8 Henry VI afforded the aggrieved party a remedy by an indictment, by assize of novel disseisin, or by an action of trespass, to recover treble damages for any loss suffered by him. As previously stated, the purpose of these statutes was to discourage the original common law practice of using force and violence, which was considered to lead to breaches of the peace.

The fact that only naked possession is at issue in the action of unlawful entry and detainer distinguishes this form of action from ejectment, where the object is to try the title or right of entry.[3]

In order to sustain this action the plaintiff must prove: that the complainant was in actual and peaceful possession of the premises; and, that the defendant forcefully entered or turned him out of possession, or dispossessed him by force.[4] Our statute fails to mention the necessity for title, deeds, or that any facts need be shown concerning the plaintiff's right of possession. It merely states that anyone deprived of possession by force, intimidation, fraud, stratagem, stealth, etc. may maintain the action.[5] This action affords a speedy remedy to recover the possession of any land which was taken by force or is held over and detained from the person in actual peaceable possession thereof. Mississippi is one of the few jurisdictions that has provided, by special statute,[6] that a purchaser at a judical sale may maintain an action of unlawful entry and detainer to recover possession of the property purchased when the judgment was made. This action is restricted to recovering possession of real property for which a writ of entry might lie at common law or by statute, and is not available as a remedy for the purpose of recovering incorporeal

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[1]Page v. Dwight, 170 Mass. 29, 48 N. E. 850 (1897).

[2]22 Am. Jur., Forcible Entry and Detainer § 3 (1955).

[3]McKay v. Shaffer, 202 Miss. 558, 32 So.2d 746 (1947); McCullum v. Gavin, 149 Miss. 885, 116 So. 94 (1928); Paden v. Gibbs, 88 Miss. 274, 40 So. 871 (1906); Clark v. Bourgeois, 86 Miss. 1, 38 So. 187 (1905).

[4]Martin v. Leslie, 229 Miss. 656, 91 So.2d 743 (1957); Tate v. Tate, 217 Miss. 734, 64 So.2d 908 (1953); Citizens' Bank v. Grisby, 170 Miss. 655, 155 So. 684 (1934); Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383 (1900); Wolfe v. Angevine, 57 Miss. 767 (1880); Rabe v. Fyler, 10 Sm. & M. 440 (Miss. 1848); Miss. Code Ann. §§ 1033. 1049 (1942).

[5]Miss. Code Ann. §§ 1033, 1049 (1942).

[6]McKay v. Shaffer, 202 Miss. 558, 37 So.2d 746 (1947); James v. Shaffer, 202 Miss. 565, 32 So.2d 749 (1947); Crittenden v. Leavenworth, 62 Miss. 32 (1884); Miss. Code Ann. §§ 1034, 1050 (1942).

real property, but lies only to recover possession of tangible or corporeal real property.

The Remedy in Mississippi

The chapter of the Code of 1942, dealing with unlawful entry and detainer might at first glance cause some confusion since Sections 1049-1058 seem to be a duplication of Sections 1033-1048. This seeming duplication is due to the fact that, generally, Sections 1033-1048 of the Code of 1942 prescribe the procedure in a special justice of peace tribunal;[7] and Sections 1049-1058 of the Code of 1942 provides a county court remedy before the county judge. These sections[8] provide that this remedy is available to anyone deprived of the possesson of land by force,[9] intimidation, fraud,[10] stratagem or stealth; and any landlord,[11] vendee, vendor,[12] mortgagee, trustee, cestui que trust or other person against whom the possession of land is withheld by his tenant, vendor, vendee, mortgagor, grantor or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withheld possession after expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy of unlawful entry and detainer.[13]

The purchaser of land at a tax sale, or his vendee, after two years from the date of the sale, and within three years therefrom, may bring this action for the recovery of possession of the land, and by statute the judgment rendered in the cause is a bar to any action in any court brought after one year from the date of the judgment.[14]

The statute specifies the form to be used for the complaint[15] and the form for the warrant[16] to be issued. The complaint and warrant must set forth that the complainant has been unlawfully turned out or is unlawfully withheld from the possession of his premises.[17] The land sued for must be described with sufficient accuracy to enable an officer

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[7]Miss. Code Ann. § 1041 (1942).
[8]Miss. Code Ann. §§ 1033, 1049 (1942).
[9]Seals v. Williams, 80 Miss. 234, 31 So. 707 (1902).
[10]Clarks v. Bourgeois, supra note 3.
[11]Rabe v. Fyler, supra note 4.
[12]Bowling v. Bowling, 47 So. 802 (Miss. 1908).
[13]Miss. Code Ann. §§ 1033, 1049 (1942).
[14]Foote v. Dismukes, 71 Miss. 110, 13 So. 879 (1893); Crittenden v. Leavenworth, 62 Miss. 32 (1884); Miss. Code Ann. §§ 1034, 1050 (1942).
[15]Miss. Code Ann. § 1035 (1942), for special justice tribunals; Miss. Code Ann. § 1051 (1942), for county courts.
[16]Brown v. Ashford, 56 Miss. 677 (1879). Miss. Code Ann. § 1036 (1942), for special justice tribunals; Miss. Code Ann. § 1052 (1942), for county courts.
[17]Brown v. Ashford, 56 Miss. 677 (1879).

to remove the defendant therefrom, should the judgment be for the plaintiff, without going outside the record to determine the location of the land.[18]

The statute concerning the special justice tribunal[19] provides that the warrant shall be made returnable to a certain day, not less than five days nor more than twenty days after the date of the warrant. There are also provisions which allow witnesses to be subpoenaed by the justice before whom the warrant was signed[20] and in cases where a witness is unable to be present in court, a deposition may be taken as in other cases before a justice of the peace.[21] Section 1041 of the Code of 1942 sets up a justice tribunal consisting of the justice issuing the warrant and two others of the county. They shall have the power to issue all proper process to bring witnesses before them and may adjourn from day to day until the trial is ended. This tribunal is considered a court of record. However, when the court issues final judgment, it is dissolved and has no power to grant a new trial.[22] A mayor of a municipality, being an ex officio justice of the peace within the territorial limits of the municipality, can serve on the tribunal.[23]

The constitutionality of this court was upheld in *Rabe v. Fyler*[24] as a special court established under the power conferred on the Legislative to establish such "inferior courts as may be necessary." If the defendant appears before the justice issuing the warrant and consents to a postponement of the trial, it may be later heard on the date set before the justice issuing the warrant and another, and the judgment will be valid, if the defendant does not object.[25] If the two justices disagree, the opinion of the justice before whom the complaint was made shall be the judgment of the court.[26] The plaintiff may recover rent in arrears and reasonable compensation for the use and occupation of the premises.[27] The Supreme Court held in *Ellison v. Landry*,[28] that under Sections 1043 and 947 of the Code of 1942 double rent may be recovered in an unlawful entry and detainer action if the plaintiff has given the defendant notice to quit.[29]

If the judgment is for the plaintiff in an action of unlawful entry and detainer and there are growing crops on the land, the defendant

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18Paden v. Gibbs, 88 Miss. 274, 40 So. 871 (1906).
19Miss. Code Ann. § 1038 (1942).
20Miss. Code Ann. § 1039 (1942).
21Miss. Code Ann. § 1040 (1942).
22Warren v. African Baptist Church, 50 Miss. 223 (1874).
23Nickles v. Kendricks, 73 Miss. 711, 19 So. 582 (1896).
2410 Sm. & M. 440 (Miss. 1848).
25McLemore v. Scales, 68 Miss. 47, 8 So. 844 (1891).
26Miss. Code Ann. § 1047 (1942).
27Miss. Code Ann. § 1043 (1942).
28199 Miss. 161, 24 So.2d 319 (1946).
29McKay v. Shaffer, supra note 3.

has a reasonable time to harvest such crops and has the right to enter on the land to give the crops necessary cultivation, provided he pays the plaintiff a reasonable compensation for the use of the land.[30]

If there is a judgment for the plaintiff, the judgment shall read that he shall recover possession of the land with his costs and the judgment shall award a writ of habere facias possessionem, providing, however, that the writ or execution shall not issue within five days of the date of the judgment.[31] If the judgment be for the defendant, the complaint of the plaintiff shall be dismissed and the defendant shall recover his full costs.[32] A judgment of the justice tribunal or of the county court shall not be a bar to an action in the circuit court between the same parties concerning the same land and their findings of fact will not be taken as conclusive.[33]

Because the justice tribunals and county courts have concurrent jurisdiction over unlawful entry and detainer actions, it would seem proper to point out the differences which exist between these two courts. The requirements for maintenance of this action are the same in the county court as they are before a justice tribunal,[34] however, the warrant issuing from the county court must be made returnable not more than ten days nor less than five days from its date of issue, whereas it must be made returnable not more than twenty days nor less than five before the justice tribunal.[35]

It should be noted that this is a summary proceeding in both the justice tribunal and in the county court;[36] thus dispensing with the necessity of a jury. This feature makes the action of unlawful entry and detainer a speedy remedy for the recovery of possession of property.

C. EMINENT DOMAIN

Definition and Characteristics

Eminent domain,[1] the power of a sovereign state to take or to authorize the taking of any property within its jursdiction for the public use without the owner's consent, is an inherent, essential political right of

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[30]Miss. Code Ann. § 1045 (1942), for justice tribunal; Miss. Code Ann. § 1056 (1942), for county court.

[31]Miss. Code Ann., § 1044 (1942), for justice tribunal; Miss. Code Ann. § 1055 (1942), for county court.

[32]Miss. Code Ann. § 1047 (1942), for justice tribunal; Miss. Code Ann. § 1057 (1942), for county court.

[33]Miss. Code Ann. § 1048 (1942), for justice tribunals; Miss. Code Ann. § 1058 (1942), for county court.

[34]Miss. Code Ann. §§ 1033, 1049 (1942).

[35]Miss. Code Ann. §§ 1036, 1052 (1942).

[36]Miss. Code Ann. §§ 1033, 1049 (1942).

[1]Black, Law Dictionary (4th ed. 1951) defines eminent domain as "the power of the state to take private property for public use."

all government even in its most primitive form. The power does not depend for its existence upon a specific grant in the Constitution, but instead exists in a sovereign state, founded upon the law of necessity.[2] The provisions found in most state constitutions relating to the taking of property for public use do not by implication grant the power to the government of the state, but limit a power which would otherwise be without limit.[3] The power embraces all cases where, by authority of the state and for the public good, the property of the individual is taken without his consent to be devoted to some particular use, by the state itself, a corporation, public or private, or by a private citizen for the welfare of the public.[4]

The exercise of this power of eminent domain is subject to all the prohibitions found in the Constitutions of the United States and of the several states. The provisions by which the power is chiefly limited are: (1) that property shall not be taken for public use without just compensation, and (2) that no person shall be deprived of his life, liberty or property without due process of law. The first of these provisions, contained in the Fifth Amendment to the Constitution of the United States, is considered to have been intended especially to govern the exercise of the power of eminent domain and is applied to that power more literally than to the other branches of sovereign authority. Since this amendment does not, however, restrict the powers of the states, but is a limitation on the powers of the Federal Government only, it is not applicable to the states except insofar as it is designed for their security against Federal power. The Mississippi Constitution contains a similar provision,[5] which is construed as a restrictive clause[6] and is binding on Mississippi state agencies.

The requirement of due process of law, found in both the Constitution of the United States[7] and the Mississippi Constitution,[8] is of general restrictive application and the power of eminent domain is within its purview. Since the due process clause of the Fourteenth Amendment to the United States Constitution operates as a restriction on the

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[2]The right of eminent domain always has been a right at common law; it is not a right in equity, nor is it even a creature of statute. Kohl v. U. S., 91 U. S. 367 (1875). The right of eminent domain is an inherent and essential element of sovereignty and therefore would exist without any constitutional recognition. Brown v. Beatty, 34 Miss. 227 (1857).

[3]Erwin v. Miss. State Highway Comm., 213 Miss. 885, 58 So.2d 52 (1952); 18 Am. Jur., Eminent Domain § 7.

[4]18 Am. Jur., Eminent Domain § 2.

[5]Miss. Const., Art. 3, § 17 (1890).

[6]Brown v. Beatty, supra note 2.

[7]U. S. Const., Fifth Amendment; U. S. Const., Fourteenth Amendment. The due process clause of the Fifth Amendment operates as a restriction on the Federal government, while the due process clause of the Fourteenth Amendment is a restriction on the states.

[8]Miss. Const., Art. 3, § 14 (1890).

states, there is a possibility of a Federal question in every taking of property by eminent domain under state authority, even if all the requirements of the state constitution are met The due process clauses, in addition to requiring that the taking be for the public use and that just compensation be given, protect the landowner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard or to present such objections and claims as he may be entitled to make.[9]

Under the customary division of governmental power, the right to authorize the exercise of the eminent domain power is wholly legislative and there can be no taking of private property for public use against the will of the owner without the direct authority of the legislature. The procedure by which the power of eminent domain may be exercised rests with the legislature subject to the restrictive requirements of the constitutions.[10] The power is inalienable and no legislature can bind itself or its successors not to exercise this power when public necessity and convenience require it.[11]

Mississippi Statutes

The procedure for the exercise of the power of eminent domain in the State of Mississippi is covered mainly in Sections 2749-2782 of the Code of 1942. These sections set forth in detail the steps to be followed by any person or corporation having the right to condemn private property for public use.[12]

A special court of eminent domain is created, to consist of a justice of the peace and a jury,[13] upon the written application of any person or corporation having the authority and desire to exercise the power. The application shall be filed with the clerk of the circuit court of the county in which the property is situated, who shall indorse thereon his appointment of a competent justice of the peace to constitute, with a jury, the special court of eminent domain. The application shall make the owners of the property sought to be condemned, mortgagees, trustees or other persons having an interest therein or a lien thereon defendants thereto, and shall state with certainty the right and describe the property sought

[9]Dohany v. Rogers, 281 U.S. 362 (1930); Whelan v. Johnston, 192 Miss. 673, 6 So.2d 300 (1942).

[10]Whelan v. Johnson, supra note 9.

[11]Georgia v. Chattanooga 264 U. S. 472 (1942); 18 Am. Jur., Eminent Domain § 7.

[12]The right of eminent domain is limited to the express terms or necessary implications of the statute. Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910). The power of eminent domain is in derogation of the common law and should be construed favorably to the owner as against the condemner, which rule applies to the quantum of interest to be taken as well as to the extent of the power vested in the condemner. Nicholson v. Board of Miss. Levee Commissionrs, 203 Miss. 71, 33 So.2d 604 (1947).

[13]Miss. Code Ann. § 2750 (1942).

to be condemned.[14] The special court is then organized according to the Code provisions;[15] and, where the application seeks to condemn the property of more than one defendant, a separate trial shall be had for each. The justice of the peace shall not, for any cause, quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. Evidence may be introduced by either party before the jury, under the direction of the justice, and the jury shall, unless the parties consent to the contrary, go to the premises and view the property sought to be condemned and its surroundings and may examine and measure the same, after which, either party may, by himself or counsel, or both, argue the cause.[16] It is mandatory that the justice of the peace, acting ministerially rather than judicially in presiding over the special eminent domain court,[17] give an instruction[18] in favor of defendant in the condemnation proceedings.[19] The jury shall give a verdict[20] specifying the exact amount of damages[21] to which the defendant is entitled, based upon their honest estimation according to the evidence adduced in the trial. The jury is the sole judge of the weight and credibility of the evidence. Judgment shall then be entered by the court in accordance with the jury's verdict.[22] Upon the return of the verdict and entry of the judgment, if the applicant pays the defendant the compensation fixed by the judgment, or tenders to him the amount of the judgment and pays the costs, he shall have the right to enter upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application.[23]

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[14]Miss. Code Ann. § 2751 (1942). Condemner must determine at his peril the names of the owner and other persons having an interest in or lien on the premises sought to be condemned. Miss. State Highway Comm. v. West, 181 Miss. 206, 179 So. 279 (1938).

[15]Miss. Code Ann. §§ 2752-2758 (1942). When an issue is ready for trial, a jury of twelve men will be organized. No irregularity in drawing, summoning or impaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after a verdict by the jury.

[16]Miss. Code Ann. § 2759 (1942). Burden of proof is on condemner on issue of damages or compensation to be allowed the owner. Miss. State Highway Comm. v. Treas., 197 Miss. 670, 20 So.2d 475 (1945).

[17]Sullivan v. Yazoo and Miss. Valley R. Co., 85 Miss. 649, 39 So. 33 (1904).

[18]Miss. Code Ann. § 2760 (1942).

[19]Any trial court, other than special eminent domain court, is not restricted to a particular instruction and formula when charging the jury as to what is "due compensation." Miss. State Highway Comm. v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

[20]Miss. Code Ann. § 2761 (1942).

[21]The value of the land taken plus the damage, if any, to the remainder of the tract, testing by the comparative value before and after such taking, is the correct rule for ascertaining the entire damage. Miss. State Highway Comm. v. Burwell, 206 Miss. 490, 30 So.2d 497 (1949).

[22]Miss. Code Ann. § 2762 (1942).

[23]Miss. Code Ann. § 2763 (1942). As to all parties right to resort to eminent domain proceedings, appropriator has no right to enter upon and appropriate land of private owner until institution of eminent domain proceedings and prosecution thereof to judgment and payment in cash of amount adjudged as compensation. Miss. State Highway Comm. v. Buchanan, 175 Miss. 157, 165 So. 795 (1936).

Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties payable to his adversary, in the amount of three hundred dollars.[24] If the appeal is made by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter upon the land of the defendant and to appropriate the same to public use be delayed.[25] If appeal is taken by an applicant other than the State of Mississippi or any political subdivision thereof, and it should desire to enter upon and take possession of the property sought to be condemned pending further litigation, it may do so at any time after the return of the verdict by depositing with the clerk of the circuit court a sum equal to double the amount of the verdict.[26] Upon appeal, the issue shall be tried de novo in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments.[27]

The legal remedy by writ of prohibition is made applicable for the purpose of testing the questions of (1) whether the applicant seeking to exercise the right of eminent domain is entitled to the right, and/or (2) whether there is a public necessity for the taking of the particular property or a part thereof.[28] All the provisions in the chapter on quo warranto,[29] shall apply to the procedure under Section 2782; and the petition for the writ may be filed by any defendant in the condemnation proceedings. Upon the filing of a petition under this section, the circuit judge shall issue a temporary order staying the hearing in the court of eminent domain until the cause can be tried by the circuit judge, and if on the hearing the petition be sustained, a permanent writ of prohibition shall issue. An appeal may be taken to the Supreme Court as in other cases, but if the judgment of the circuit judge is to deny the petition, the appeal aforesaid shall not operate as a supersedeas, and the court of eminent domain may nevertheless proceed.[30] Section 2782 establishes the exclusive remedy and tribunal for determining the question of public necessity, and in the absence of fraud or manifest abuse of the condemning agency's discretion, the grant

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[24]Miss. Code Ann. § 2766 (1942).

[25]See note 24 supra.

[26]See note 24 supra.

[27]Appeals from special eminent domain courts should be brought to circuit court and there tried de novo. Hattiesburg v. Pritchett, 160 Miss. 142, 179 So. 279 (1931).

[28]Miss. Code Ann. § 2782 (1942). This statute is the exclusive authority for a writ of prohibition restraining a condemnation proceeding, except in cases of a want of jurisdiction in the eminent domain court. Dantzler v. Miss. State Highway Comm., 187 Miss. 721, 193 So. 4 (1940).

[29]Miss. Code Ann. §§ 1120-1145 (1942).

[30]A landowner's petition for a writ of prohibition, which has been denied by the circuit judge, avails him nothing on appeal unless the Supreme Court should reverse the judgment appealed from before final judgment in the eminent domain court. Dantzler v. Miss. State Highway Comm., supra note 28.

of power under this section excludes the implication of an analogous power in the chancery court.[31]

The County Court Act[32] now gives exclusively to the county court the jurisdiction heretofore exercised by justices of the peace in special eminent domain proceedings in all instances where there is a county court in existence in the county wherein the property is located.[33] The rules of pleading, practice and procedure to be followed in the county courts shall be the same as those governing a special court of eminent domain,[34] except that all pleadings in the county court shall be in writing, and the jury shall be instructed by the judge in the manner now provided by law for instructing the jury in the circuit courts.[35]

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[31]Erwin v. Miss. State Highway Comm., supra note 3. But see Culley v. Pearl River Industrial Comm., 108 So.2d 390 (Miss. 1959), wherein the Miss. Supreme Court decided the question of public use without any previous proceedings in court of eminent domain and without a petition for a writ of prohibition being filed under Section 2782.

[32]Miss. Code Ann. § 1604 (1942). The County Court Act did not repeal the entire domain chapter, but both must be construed together, and all provisions of each not repugnant to provisions of the other must stand, but in case of repugnancy the county court chapter controls. Miss. State Highway Dept. v. Haines, 162 Miss. 216, 139 So. 168 (1932).

[33]Miss. State Highway Dept. v. Haines, supra note 32.

[34]Miss. Code Ann. § 1607 (1942). An appeal from county court to circuit court in eminent domain proceedings is on the record made in county court, and if there is no error the judgment will be affirmed, but if there is error there must be a trial de novo in the circuit court. Miss. State Highway Comm. v. Reddoch, 184 Miss. 302, 186 So. 298 (1939).

[35]Miss. Code Ann. § 1607 (1942).

APPEALS FROM: (A) MAYOR AND ALDERMEN; (B) BOARD OF SUPERVISORS; (C) PUBLIC SERVICE COMMISSION; (D) MISSISSIPPI EMPLOYMENT SECURITY COMMISSION; (E) OIL AND GAS BOARD

*William J. Gunn, Jr.**

The purpose of this article is to give a general discussion of appeals from the various boards and commission enumerated above. As most of these appeals are controlled by specific statutes, which will be hereinafter referred to, it becomes immediately apparent that strict compliance with the statutory requirements as to time, method, and manner of taking an appeal is a necessity. Two methods of review have come into general use in the development of the English judicial system. Either the case is heard de novo in an appellate court or the case is heard upon claimed errors and the result is to affirm, modify or reverse the judgment of the lower court. One is, in effect, a new trial, while the other passes merely upon the alleged errors in the lower court. In most American jurisdictions the two have been combined in varying degrees and the modern statutory appeal seems to partake of the nature of both of these fundamental methods. In any event, it is generally agreed that the term "appeal" is sometimes a word with a very indefinite meaning. In this discussion reference will be made to the controlling statutes and an analysis made of some of the governing principles enunciated by our courts.

A. MAYOR AND ALDERMEN

Our general statute[1] governing appeals of this type from judgments or decisions of municipal authorities provides that any person aggrieved thereby may appeal within ten days from the date of adjournment of the session in which such judgment or decision was rendered. The facts, judgment and decision may be embodied in a bill of exceptions which shall be signed by the person acting as president of the board; the clerk shall transmit the bill of exceptions to the circuit court on or before the first day of the next succeeding term, or at once if the court be in session; and the court shall hear and determine the case as presented by the bill of of exceptions as an appellate court and shall affirm or reverse the judgment. In the event the judgment is reversed, it is the duty of the circuit court to render such judgment as the municipal authorities should have rendered and certify and return the same to the municipal authorities with costs awarded as in other cases. The statute further authorizes the

*Circuit Judge, Tenth Judicial District, Meridian, Mississippi.
[1]Miss. Code Ann. § 1195 (1942).

employment of counsel to defend such appeals and authorizes payment thereof out of the municipal treasury.

When the bill of exceptions is duly presented, it is the duty of the presiding officer to sign it.[2] In the event of refusal to sign by the presiding officer, it appears that mandamus would be the proper remedy and not the procedure under Section 1534 of the Code of 1942 wherein the signing of a bill of exceptions is authorized by the attorney when a judge refuses to sign. This conclusion is based on a case that involved this same section, in which it was held that Section 1534 did not apply.[3] The bill of exceptions must ordinarily be signed during the term of the municipal board in which the order complained of was passed, and where the time is not extended, the presiding officer is correct in refusing to sign a bill after adjournment.[4] However, where a bill is duly prepared and presented during the term, the exceptor will not be prejudiced because of failure of the presiding officer to sign it during the term.[5]

Though not specifically in point, it is appropriate in passing to mention several instances wherein jurisdiction of matters of objection to or appeal from actions of municipal authorities is vested in the chancery, rather than the circuit court. Among these are objections to matters relating to the issuance and sale of bonds by municipal authorities[6] and action of municipal authorities in extending or contracting corporate boundaries.[7]

When the matter is considered on appeal, the circuit court is limited to a consideration of the facts as embodied in the bill of exceptions, and oral testimony cannot be heard by agreement of the parties, even when confined to witnesses examined before the municipal authorities.[8] However, where a claim is rejected or disallowed by municipal authorities, the claimant is not limited to the procedure of appealing therefrom and embodying his claim and the facts with reference thereto in a bill of exceptions, but may institute suit directly against the municipality as was done in *Pyland v. Purvis*.[9]

As to appeals from the assessment of taxes, another statutory remedy is provided.[10] In such a case the trial or controversy is heard de novo in the circuit court.

Another procedure is provided in the matter of appeals from con-

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2Polk v. Hattiesburg, 109 Miss. 872, 69 So. 675 (1915).
3Roach v. Tallahatchie County, 78 Miss. 303, 29 So. 93 (1901).
4Hathorn v. Morgan, 107 Miss. 589, 65 So. 643 (1914).
5McGee v. Beall, 63 Miss. 455 (1886).
6Miss. Code Ann. § 1195 (1942).
7Miss. Code Ann. § 3374-10 (1942). (Code Section 3374-32 places jurisdiction of these matters in the chancery court even though a different procedure is provided for in the charter of such municipality).
8Greenwood v. Henderson, 84 Miss. 802, 37 So. 715 (1905).
987 Miss. 433, 40 So. 7 (1906).
10Miss. Code Ann. § 1196 (1942).

victions of criminal offenses where violations of municipal ordinances are involved.[11]

B. BOARD OF SUPERVISORS

The same general statute hereinabove discussed covers appeals from a Board of Supervisors.[12] It follows that the same principles with reference to time, method and manner of taking such an appeal applies, and the procedure followed is much the same in regard to the bill of exceptions, the hearing thereof and the affirmance or reversal of the Board when appeals are taken under this section.

With reference to the matter of claims against a county, it is provided in Section 2932 of the Code of 1942 that any person having such a claim which has been rejected in whole or in part by the Board of Supervisors may appeal to the circuit court, or such appeal may also lie if a Board refuses, when requested at a proper time, to pass finally thereon. In the alternative, claimant is authorized hereunder to bring suit against a county. It has been held that one cannot sue a county unless his claim has first been presented to and rejected by the Board of Supervisors.[13] Such fact of presentment and disallowance must be affirmatively alleged in such a suit,[14] but it is unnecessary to show an order on the minutes of the Board rejecting the same since it has been held that the disallowance may rest in parol.[15] Our court has also said that this section applies to all claims against the county whether based on tort or contract.[16] Of course, the right to sue the county is regulated by our Constitution and statutes.

In *Lafayette County v. Jones*[17] it was contended that Section 2932 of the Code of 1942 was the only statute authorizing an appeal from the disallowance of a claim by the Board of Supervisors, but the Court rejected the contention since Section 1195, Code of 1942, was the general statute providing for such an appeal. Where a claim is presented to the county and allowed only in part by the Board and an appeal is not taken during the statutory time, such action becomes final.[18] In the case above referred to, the Court held that the judgment of the Board for forty dollars (which was only part of the claim filed) was a judgment against the county for that amount, and, inasmuch as it was not appealed from, it was final and binding on the county; consequently, no right existed to sue the county for a portion of the claim which the Board dis-

[11]Miss. Code Ann. §§ 1202, 1203, 1205 (1942).
[12]Miss. Code Ann. § 1195 (1942).
[13]Lawrence County v. Brookhaven, 51 Miss. 68 (1875).
[14]Covington County v. Morris, 122 Miss. 495, 84 So. 462 (1920).
[15]Simpson County v. Kelly, 175 Miss. 596, 166 So. 532 (1936).
[16]Davis v. Lamar County, 107 Miss. 827, 66 So. 210 (1914).
[17]199 Miss. 373, 25 So.2d 844 (1946).
[18]George County v. Bufkin, 117 Miss. 844, 78 So. 781 (1918).

allowed. It has also been held that where a matter has been rejected by the Board and the time for an appeal therefrom has passed, the same matter cannot again be presented to the Board—the first adjudication rendering the matter res adjudicata.[19] Apparently, where claims are completely disallowed, the remedy of claimant may either be by way of appeal to the circuit court or by suit against the county. On the other hand, where a claim is allowed in part and rejected in part, the question arises under the holding of *Lafayette County v. Jones* as to whether or not an appeal to the circuit court under Section 1195 of the Code becomes the only remedy of claimant. It appears that the answer to this question is in the affirmative.

Another type of appeal of importance from a Board of Supervisors is an appeal from the assessment of taxes, and the statute governing this type of appeal is Section 1196, Code of 1942. This Section provides that any person aggrieved by a decision of the Board as to the assessment of taxes may, within ten days after adjournment of the meeting at which such decision was made, appeal to the circuit court upon giving bond as therein specified, whereupon the clerk of the Board makes a copy of any papers relating to the controversy and files such papers and the bond with the clerk of the circuit court on or before its next term. The matter is tried anew in the circuit court at the first term as a preference case, and if decided against the person appealing, judgment is rendered on the appeal bond with damages at the rate of 10 per cent on the amount in controversy and all costs. If the matter is decided in favor of the person appealing, judgment in his favor is entered and certified to the Board of Supervisors, and it becomes the Board's duty to conform thereto and to pay the costs. The other pertinent part of the statute is as follows:

> "The County attorney, the district attorney, or the attorney general, if the state, county or municipality be aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village as to the assessment of taxes, may, within twenty days after the adjournment of the meeting at which such decision is made, or within twenty days after the adjournment of the meeting at which the assessment rolls are corrected in accordance with the instructions of the state tax commission, or within twenty days after the adjournment of the meeting of the board of supervisors at which the approval of the roll by the state tax commission is entered, appeal to the circuit court of the county in like manner as in the case of any person aggrieved as hereinbefore provided, except no bond shall be required, and such appeal may be otherwise governed by the provisions of this section."

[19]Robinson v. Itawamba County, 107 Miss. 352, 65 So. 461 (1914).

The Board of Supervisors in performing its duties as fiscal agent of the county and in its assessing duties, acts pursuant to statute, and the assessment process must be substantially followed. For a discussion of some of the important principles governing the assessing process and appeals therefrom, reference is here made to an excellent article by one having long experience in such matters.[20] One pertinent comment from the above article is worthy of re-emphasis on every occasion:

> "There are probably more attorneys who appear before boards of supervisors in cases of assessments of property than on any other matter. If they represent a bank, corporation or any other taxpayer, they should study the statutory scheme involved, and the decisions of the Supreme Court of Mississippi construing these statutes before they file objections to the particular assessment involved."

The above statement regarding knowledge of how, when and whether to appeal applies with equal force to the entire subject of appeals herein discussed.

C. PUBLIC SERVICE COMMISSION

Sweeping changes were made in the powers, duties and functions of the Mississippi Public Service Commission in 1956 by legislative enactment regarding the authority and manner of regulating public utilities in this state.[21] This important legislation, in addition to many other changes, changed the appeal procedure from the Commission. Generally, the Commission has the power: to prescribe reasonable rules and regulations in order to carry out the provisions of the Act;[22] to entertain exclusive original jurisdiction over the intrastate business and property of public utilities with certain exceptions;[23] to conduct hearings[24] and to make and file findings and orders which are supported by substantial evidence presented in the hearings;[25] to rescind or amend any order or decision made by it[26] after notice and opportunity to be heard is given.[27] A full and complete record is kept of all proceedings before the Commission, or any Commissioner, or any formal hearing, and all testimony is taken down by a reporter appointed by the Commission.[28]

After an order or decision has been made by the Commission, any party to the proceedings, may, within thirty days after the entry of the

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[20]Johnson, Legal Principles Governing County Boards of Supervisors, 21 Miss. L.J. 340 (1950).
[21]Miss. Code Ann. § 7716-01 (1942).
[22]Miss. Code Ann. § 7716-23 (1942).
[23]Miss. Code Ann. § 7716-04 (1942).
[24]Miss. Code Ann. §§ 7705 and 7716-14 (1942).
[25]Miss. Code Ann. § 7716-22 (1942).
[26]Miss. Code Ann. § 7716-23 (1942).
[27]Miss. Code Ann. § 7716-14 (1942).
[28]Miss. Code Ann. § 7716-24 (1942).

order or decision, apply for a re-hearing in respect to any matter determined in said proceedings and specified in the application for rehearing. The Commission may grant and hold a re-hearing on any matter. The filing of an application for re-hearing does not stay or suspend the effective date of any Commission order or the obligation of any person to comply with such order unless the Commission, in its discretion, stays, suspends, or modifies such order. However, any party to the proceedings is entitled to a stay of the order, as a matter of right, upon filing with the Commission a bond payable to the State of Mississippi in such an amount and with sufficient surety (both as determined by the Commission) to insure the prompt payment of any damages or refunds to the party or persons entitled thereto, if the order shall at the conclusion of any subsequent proceedings become effective. Within twenty days after the application for such re-hearing, the Commission either grants or refuses the same, and a failure to act thereon is deemed a refusal. If the application is granted, the Commission enters a new order after the re-hearing which becomes effective ten days after entry, unless otherwise provided by the Commission for reasonable cause.[29]

All Commission matters appealed to any court take preference over other cases as a matter affecting the public interest, thus all courts are required to docket and dispose of such cases at the earliest moment compatible with the ends of justice.[30] In all actions and proceedings arising out of the exercise of the authority and powers granted to the Commission, the burden of proof is on the party seeking to vacate an order of the Commission.[31]

The general statute[32] providing for review is as follows:

"(a) In addition to other remedies now available at law or in equity, any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for the rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings

[29]Miss. Code Ann. § 7716-25 (1942).
[30]Miss. Code Ann. § 7716-29 (1942).
[31]Miss. Code Ann. § 7716-31 (1942).
[32]Miss. Code Ann. § 7716-26 (1942).

before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be, but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights."

The pending of proceedings to review does not, of itself, either stay or suspend the operation of the order of the Commission—except in the case of a rate order where a utility has put rates into effect under bond as is provided in Section 7716-10 of the Code of 1942. However, any party may, as a matter of right, secure an order from the court in which the review or appeal is sought, suspending or staying the operation of the Commission's order by adequately securing the other parties against loss due to the delay in the enforcement of the order in case the order under review is affirmed—the security to be of such form and amount as shall be directed by the court granting the stay or suspension. If an appeal is taken from an order of the Commission reducing existing

rates or refusing to approve rates proposed by a utility, the court, in suspending the order of the Commission and pending final determination of the appeal, either permits the existing rates to remain in effect or places the proposed rates in effect, provided a bond is filed, in a reasonable amount approved by the court with sureties approved by the court, conditioned upon refund, with lawful interest to the parties entitled thereto of the amount of the excess if an existing rate or the rate so put into effect is finally determined to be excessive. Or, the court may, if a utility has put rates into effect under bond under the section above referred to, require the utility to file a bond for such additional amount as the court deems proper.[33]

Appeals in accordance with law may be made to the Supreme Court of Missssippi from any final judgment of the chancery court.[34] The Commission is empowered to apply to the chancery court, First Judicial District of Hinds County, for enforcement by mandamus, injunction or other appropriate remedy of any order of the Commission.[35] The subject matter of appeals of this nature embody a field of law so vast as to defy any attempt of discussion in an article of this nature. However, limiting this discussion to the statutory provisions, it should also be pointed out that in a recent case[36] our Court held that Section 7699, Code of 1942, which was left remaining in the Code at the time of the enactment of Section 7716-26, (Section 7699 provides for appeals from the Commission to the First Judicial District, Circuit Court of Hinds County within six months), was superseded and the effect thereof was to transfer to the Chancery Court of Hinds County (first Judicial district) the appellate jurisdiction heretofore existing in the circuit court and reduce the time for appeal to thirty days instead of six months. In this same case, the Court also held that certiorari under Section 1207 of the Code of 1942, the general statute on appeals by certiorari, would not lie since the writ would not issue in those cases where there is a plain, speedy and adequate remedy by appeal—the City of Jackson had available to it a plain and adequate remedy by appeal under Section 7716-26.

These few observations and citations are less than elemental to those accustomed to dealing in this technical field of law and, if any purpose is served hereby, it is simply to remind the rest of us that such procedure does exist.

D. MISSISSIPPI EMPLOYMENT SECURITY COMMISSION

The Mississippi Employment Security Law was originally enacted

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[33]Miss. Code Ann. § 7716-27 (1942).
[34]Miss. Code Ann. § 7716-28 (1942).
[35]Miss. Code Ann. § 7716-30 (1942).
[36]Miss. Valley Gas Co. v. City of Jackson, 109 So.2d 637 (Miss. 1959).
[37]Miss. Laws c. 176 (1936).

in 1936.[37] In 1940 a commission composed of three members to be known as the Unemployment Compensation Commission was provided for,[38] and in 1944 and 1948 certain amendments thereto were adopted[39] while certain other changes were made in 1956[40] and in 1958.[41] Since July 1, 1948, the Unemployment Compensation Commission has been designated as the Mississippi Employment Security Commission.[42] It is the duty of the Commission to administer the employment security law, and the Commission has the power to adopt, amend or rescind rules and regulations and do certain other things not inconsistent with the Act.[43] General rules may be adopted, amended or rescinded by the Commission only after a public hearing or an opportunity has been given to be heard thereon—provided proper notice has been given. Such rules become effective ten days after being filed with the Secretary of State and publication in one or more newspapers of general circulation n the state. Regulations may be adopted, amended or rescinded by the Commission and become effective in the manner and at the time prescribed by the Commission.[44] Involuntary unemployment is the evil sought to be remedied, together with achievement of more stable employment and the systematic accumulation of funds during periods of employment in order to provide benefits for periods of unemployment. This result is accomplished by the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons when such unemployment arises through no fault of their own.[45] Weekly benefits for these purposes and the method and manner of computation are covered by statute,[46] as well as benefit elegibility conditions,[47] disqualifying conditions,[48] and the duration of such compensations.[49] Only insofar as the above comments pertain to the point of appeals and establish the fact of a fund from which benefits may be paid are they pertinent. Thus, the usual matter of appeal in this category involves the question of whether or not a claimant is entitled to benefits hereunder for a particular period. Claims for benefits are made in accordance with such regulations as the Commission may prescribe.[50] An examiner designated by the Commission takes a claim and an official determination is made thereon. The claimant and other parties to the determination are notified of the official

38Miss. Laws c. 295 (1940).
39Miss. Laws c. 288 (1944); Miss. Laws c. 412 (1948).
40Miss. Laws c. 404 (1950).
41Miss. Laws c. 533 (1958).
42Miss. Laws c. 412 (1948).
43Miss. Code Ann. § 7405 (1942).
44Miss. Code Ann. § 7406 (1942).
45Miss. Code Ann. § 7369 (1942).
46Miss. Code Ann. §§ 7373, 7374, 7375, 7376, 7377 (1942).
47Miss. Code Ann. § 7378 (1942).
48Miss. Code Ann. § 7379 (1942).
49Miss. Code Ann. § 7376 (1942).
50Miss. Code Ann. § 7380 (1942).

determination and the reasons therefor. The jurisdiction of the Commission over claims involving no appeal is continuous. Claimant or any party to the determination may file an appeal from the initial determination of the examiner within seven days after notification thereof, or after the date such notification was made to his last known address.[51]

To facilitate the work of the Commission, there is a Board of Review[52] composed of three members, appointed by the Commission, and the Board of Review appoints one or more impartial appellate tribunals consisting in each case of either a referee, or a body consisting of three members—one, a referee who serves as a chairman, another, a representative of employees and the third, a representative of employers.[53] The appellate tribunals hear and decide appeal claims after affording the parties a reasonable opportunity for a fair hearing and affirm, modify or reverse the findings of fact and the initial determination. The parties are notified of this tribunal's decision together with the reasons therefor. This is deemed the final decision of the Board of Review unless within ten days after the date of notification or mailing of such decision, further appeal is initiated as hereinafter discussed. By statute, the Board of Review is required to permit further appeal from a decision of an appellate tribunal which is not unanimous, or of one by an examiner whose decision has been overruled or modified by an appellate tribunal.[54] Furthermore, the Board of Review may on its own motion: affirm, modify, or set aside any decision of an appellate tribunal on the basis of evidence previously submitted; direct the taking of additional evidence; or permit any of the parties to such a decision to initiate further appeals before it. In addition, the Board of Review may itself take such an appeal or transfer to another appellate tribunal the proceedings on any claim pending before an appellate tribunal, and any proceedings so removed shall be heard in accordance with the requirements of Section 7382, Code of 1942. Within fifteen days after notice of appeal has been received by the Chairman of the Board of Review and thereafter within four days after its decision, the Board is required to notify the parties of its findings and decision.[55] In the absence of an appeal from the Board of Review to the circuit court, the decision of the Board becomes final ten days after the date of notification of mailing thereof.

These steps necessarily have been traced in detail since it is provided by statute that judicial review is permitted only after any party

51Miss. Code Ann. § 7781 (1942).
52Miss. Code Ann. § 7404 (1942).
53Miss. Code Ann. §§ 7382, 7383, 7384 (1942).
54Miss. Code Ann. § 7384 (1942).
55Miss. Code Ann. § 7384 (1942).

claiming to be aggrieved has exhausted these administrative remedies.[56]

The next step may then be an appeal to the circuit court. Within ten days after the decision of the Board of Review has become final any party aggrieved thereby may secure judicial review by commencing an action in the circuit court of the county in which the party resides. Such an action is commenced against the Commission for a review of its decision, and any other party before the Board of Review shall be made a defendant in the proceeding. This action is commenced by the filing of a petition, which need not be verified, but which must state the grounds upon which a review is sought. The petition is served on the Commission, or upon such person as the Commission may designate. Service in this manner is deemed complete on all parties provided there is left with the party so served as many copies of the petition as there are defendants—it being the duty of the Commssion to forthwith mail one such copy to each defendant. When the Commission files its answer, it is also required to certify and file with the circuit court all documents and papers and a transcript of all testimony taken in the matter together with the Board of Review's finding of fact and its decision. In its discretion the Commission may also certify to the circuit court questions of law involved in any decision. The findings of the Board of Review as to the facts, if supported by evidence, and in the absence of fraud, are conclusive and the jurisdiction of the circuit court is confined to questions of law. Such action and the questions so certified are given precedence over all other civil cases. An appeal from the decision of the circuit court may be taken to the Supreme Court in the same manner, not inconsistent with the provisions of the Act, as is provided in civil cases. It is not necessary to enter exceptions to the rulings of the Board of Review and no bond is required for taking such an appeal. Upon final determination by the circuit court, or the Supreme Court as the case may be, the Board of Review is required to enter an order in accordance with the determination made by the court. Any petition for judicial review does not act as a supersedeas or stay unless the Board of Review shall so order. The procedure outlined above is provided for and controlled by statute.[57] The statute provides, and the Supreme Court has so held, that findings of fact by the Board of Review amply supported should be taken as conclusive both by the circuit court and the Supreme Court on review.[58] Under Section 7389 of the Code of 1942, the Commission is authorized to appeal from decisions of the Board of Review involving questions of interpretation of the general act, and

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[56]Miss. Code Ann. § 7387 (1942).

[57]Miss. Code Ann. § 7388 (1942).

[58]Miss. Unemployment Compensation Commission v. Avent, 192 Miss. 85, 4 So.2d 296, *appeal dismissed* 316 U.S. 641 (1941).

notice of appeals are served upon other parties and heard by the courts in the manner as provided in the general statute above outlined—providing that such appeal by the Commission does not have the effect of denying benefits to any claimant who has been awarded benefits by virtue of the decision of the Board of Review from which the appeal is taken.[59]

The Unemployment Compensation Law has been upheld as not infringing upon any of the sovereign powers retained by the state and recited in the State Constitution.[60] Other interesting questions such as whether or not unemployment must be involuntary in order for a claimant to be eligible for benefits; denial of a union member's benefits under the Act because of his refusal to accept non-union employment;[61] and the test to be applied to determine the existence of the employer-employee relationship under the Act[62] have been considered by the Mississippi Supreme Court.

E. OIL AND GAS BOARD

In order to foster, encourage and promote the development, protection and utilization of the natural resources of oil and gas in Mississippi and to protect the public and private interests against the evils of waste in the production and utilization thereof, a State Oil and Gas Board composed of five members was created in Mississippi and vested with certain powers and duties.[63] These powers and duties are enumerated by statute.[64] In carrying out these functions, the Board has authority to prescribe its rules of order and procedure in hearings or other proceedings before it. A competent shorthand reporter is required to be present throughout all public hearings, and the Board has the same control over such reporter, and the reporter's duties are the same, as those fixed by statute for court reporters insofar as they are applicable. The original transcript of testimony taken in any hearing and reduced to writing by the reporter is evidence of such proceeding, and on appeal to the circuit court, the original of such transcript shall be used.[65] No rule, regulation or order, change, renewal, or extension thereof shall be made by the Board, in the absence of an emergency, except after public hearing upon at least ten days' notice by publication in a newspaper of general circulation in the county or counties in which pools are located in the manner and form as may be prescribed by the Board

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[59]Unemployment Compensation Commission v. Barlow, 191 Miss. 156, 1 So.2d 241, 2 So.2d 544 (1941).

[60]Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

[61]Mills v. Mississippi Employment Security Commission, 89 So.2d 727, (Miss. 1956).

[62]Miss. Employment Security Commission v. Heidelberg Hotel Co., 211 Miss. 104, 51 So.2d 47 (1951).

[63]Miss. Laws c. 117 (1932); Miss. Laws c. 256 (1948); Miss. Laws c. 213 (1950).

[64]Miss. Laws c. 163 (1956).

[65]Miss. Laws c. 185 (1958).

by general rule. Any person having any interest in the subject matter is entitled to be heard.[66] In the event of an emergency, determined by the Board, it may act without having a hearing as above mentioned and such rule, regulation or order so adopted remains in force for forty-five days from its effective date, or, in any event, expires when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency becomes effective.[67] Notice and service may be made by any officer authorized to serve process or notice may be issued by any member of the Board or its supervisor, and any agent of the Board in the same manner as is provided by law for the service of summons in civil actions of the circuit court.[68] The rules, regulations and order of the Board are required to be kept in writing and entered in full by the Secretary of the Board in a book which is a public record and open to inspection at all times during reasonable office hours, and copies of any such rules, regulations, or orders certified by a member of the Board, or the secretary thereof, are received in evidence in all courts of the state with the same effect as the original.[69]

Any interested person has the right to have the Board call a hearing for the purpose of taking action in respect to any matter within the jurisdiction of the Board by making a request therefor in writing. Upon receipt of such request the Board is required to promptly call a hearing thereon. After such hearing and with all convenient speed, and in any event, within thirty days after the conclusion of such hearing, the Board must take such action with regard to the subject matter as it may deem appropriate.[70] However, our Supreme Court has held that though this statute places upon the Board the responsibility of acting expeditiously, it does not provide that action of the Board taken more than thirty days after the hearing is invalid—the Board having a right to continue a hearing in order to determine what it should do.[71]

This statutory background seems to be necessary, at least to the author, in order to arrive at an appropriate point to discuss appeals from actions of the Board.

Perhaps attention should first be directed to the fact that by express statutory provision no temporary restraining order or injunction of any kind shall be granted against the Board, or any agent, employee or representative of the Board, restraining it from enforcing any statute

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66Miss. Laws c. 185 (1958).
67Miss. Laws c. 185 (1958).
68Miss. Laws c. 185, § 1d (1958).
69Miss. Laws c. 185, § 1e (1958).
70Miss. Laws c. 185, § 1f (1958).
71Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85, (1952), *suggestion of error overruled* 214 Miss. 890, 59 So.2d 844 (1952).

of Mississippi relating to conservation of oil and gas, or any rule, regulation, or order thereof except after due notice to the Board and all other defendants. Furthermore, no temporary restraining order or injunction shall be granted except after a hearing in which it shall be clearly shown to the Court that the act done or threatened is without sanction of law, or that the provision of law, or the rule, regulation, or order complained of is invalid, and that, if enforced against the complainant, will force an irreparable injury.[72] With respect to any such order or decree granting temporary injunctive relief thereunder, it is further provided that the nature and extent of the probable invalidity of the statute or of any provision, rule, regulation or order thereunder involved in such suit must be recited in an order or decree granting temporary relief as well as a clear statement of the probable damage relied upon by the court as justifying temporary injunctive relief. Such temporary injunction or restraining order becomes effective only after the complainant executes a bond in such amount and upon such conditions as the court may direct.[73] Obviously, these references pertain to procedure in the chancery court.

In addition to these remedies, and others now available, the State or any interested person aggrieved by any final rule, regulation, or order of the Board has the right, regardless of the amount involved, to appeal to the circuit court of the First Judicial District of Hinds County, Mississippi, or to the circuit court in which all or a part of the property affected by such rule, regulation, or order is situated. Such an appeal should be taken with thirty days from the date of the final rule, regulation or order. The circuit court may affirm the matter or reverse it for further proceedings as justice may require. All such appeals may be heard and determined either in term time or in vacation on the record, including a transcript of pleadings and testimony filed or heard by the Board, and such appeal must be heard and disposed of promptly by the court as a preference cause. The same provisions concerning notice to the reporter and the allowance of bills of exception now or hereafter in force respecting appeals from circuit court to the Supreme Court are applicable—except that the reporter is required to transcribe his notes and file the transcript within thirty days after approval of the appeal bond.[74]

An appeal may be instituted by filing a petition with the Board whereupon it becomes the duty of the Board, as promptly as possible, and in any event within sixty days after approval of the appeal bond, to file with the clerk of the appropriate circuit court a copy of the petition and of the rule, regulation, or order appealed from together with the original and one copy of the transcript of the record of proceedings in evidence

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[72]Miss. Laws c. 185, § 2c (1958).
[73]Miss. Laws c. 185, § 2d (1958).
[74]Miss. Laws c. 185, 2a (1958).

before the Board. After the petition has been filed, the appeal is perfected by filing a bond in the sum of five hundred dollars with two sureties or a surety company qualified to do business in Mississippi, conditioned to pay the cost of such an appeal. The bond may be approved by any member of the Board or the Supervisor or by the Clerk of the court to which the appeal is taken. Perfection of the appeal does not stay or suspend the operation of any rule, regulation or order of the Board, but the judge of the circuit court to which the appeal is taken may award a writ of supersedeas after five days' notice to the Board and after a hearing. The order or judgment staying the operation thereof must contain a specific finding based upon evidence submitted to the circuit judge and identified by reference thereto that great or irreparable damage would result to the appellant if such relief were denied. The stay does not become effective until a supersedeas bond, payable to the State, is filed and approved by the clerk of the court or the circuit judge—the amount thereof to be fixed by the circuit judge and conditioned as directed in the order granting the stay.[75] Thereafter, an appeal may be taken to the Supreme Court in accordance with the general laws of our state relating to appeals from any judgment of the circuit court (or from the chancery court as hereinbefore discussed). Such an appeal when docketed in the Supreme Court is placed on the preference docket and may be advanced as the Court directs.[76]

As was stated with reference to appeals from the Public Service Commission, a vast field of law is involved in appeals of this nature and no attempt is here made to deal therein.

The power of the Board to require compulsory pooling has been upheld by our Supreme Court as within the police power of the state and is constitutionally valid.[77] Spacing rules, adopted by the Board under its delegation of legislative power, have also been upheld as a reasonable exercise of police powers. In *Superior Oil Company v. Griffith*,[78] the Supreme Court held that the extent of its authority on appeal was limited to that of the circuit court, which was to affirm the order of the Board or reverse it for further proceedings—the court in that case declined to modify an order of the Board.

These, then, are some of the fundamental principles applicable from a consideration of the statutes and interpretations by our Supreme Court regarding the appeals herein discussed.

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[75]Miss. Laws c. 185, § 2b (1958).
[76]Miss. Code Ann. § 6132-27 (1942).
[77]Superior Oil Co. v. Foote, supra note 71.
[78]Superior Oil Co. v. Griffith, 214 Miss. 900, 60 So.2d 505, *sustaining suggestion of error* 214 Miss. 891, 59 So.2d 104 (1952); Harper, Administrative Procedure Before The State Oil and Gas Board, 29 Miss. L.J. 82 (1957).

PRACTICE AND PROCEDURE ON APPEALS IN THE SUPREME COURT OF MISSISSIPPI

*Fred J. Lotterhos, Jr.**

It is the purpose of this article to present and discuss the various facets of this topic as completely as space permits, trusting that such an overall treatment will be of assistance to members of the Bar, and of general interest to those others to whom these presents might come. In keeping with the theme of this issue of the Journal, the discussion will be limited to appeals from the circuit court to the Supreme Court.

It is suggested that this paper be read with a copy of the August, 1958 special issue of the *Mississippi Law Journal* at hand for reference. That issue, containing as its does the revised rules of the Supreme Court, annotated by Mr. Kenneth G. Perry, and the article entitled "Some Suggestions as to Oral Arguments and Written Briefs in the Supreme Court of Mississippi," by Judge W. G. Roberds, together with the present article should cover the field of Supreme Court practice and procedure in this State.

Chapter 12, Title 10, of the Code of 1942, provides for the establishment of the Supreme Court, its make-up, jurisdiction and function. This Chapter not only prescribes certain procedures to be followed in Supreme Court practice, but authorizes the Court to make such rules regarding the preparation of records, and regulations prescribing the mode of pleading and practice, as may be expedient and necessary and proper "for certainty and dispatch of business, and may dismiss causes for non-compliance with any of the rules."[1]

The Supreme Court is an appellate court and possesses such jurisdiction as properly belongs to a court of appeals; and is to hear and determine all manner of pleas, complaints, motions, causes, and controversies, civil and criminal, which may be brought before it, and which shall be cognizable in said court. A cause shall not be removed to the Supreme Court until final judgment is rendered in the court below, except in cases particularly provided for by law; and the court may grant new trials and correct errors of the circuit court in granting or refusing the same.[2]

An appeal is not a matter of right, but is regulated by statute, and will only lie in cases provided for by statute. Thus, no appeal lies by attorneys for plaintiff from a voluntary non-suit without prejudice;[3] nor

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[1]Miss. Code Ann. § 1961 (1942).

[2]Miss. Code Ann. § 1945 (1942).

[3]State ex rel. Brown v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919).

by counselors of the court, nor amicus curiae from a judgment reinstating a disbarred attorney;[4] nor from an order or judgment vacating a writ of garnishment and dismissing the suit as to a garnishee, where the writ of garnishment is issued as a part of an attachment writ in a suit still pending in the trial court at the time of the attempted appeal.[5]

The Court has no power or duty to render advisory opinions,[6] nor will it adjudicate moot questions.[7] In *Sheldon v. Ladner,*[8] the Court said:

> "We have repeatedly declared that we would not adjudicate moot questions . . . . In the Sellier case, supra, we said (174 Miss. 360, 164 So. 768): 'There is no principle of law better established than that courts will not adjudicate moot questions; that they will only decide real controversies, not imaginary ones; and that no judgment will be rendered which is unenforceable and therefore useless' . . . . As to the appellant's defense against this motion, that we should issue an advisory opinion, we have several times declared our lack of authority to do so. We have specifically said in re Opinion of the Justices, 148 Miss. 427, 114 So. 887, 888, dealing with advisory opinions between departments of the State government: 'Moreover, and aside from this prohibition, the giving by judges of opinions on questions that may thereafter be submitted for decisions to the courts of which they are members is highly improper unless they are constitutionally authorized so to do.' 'We are not authorized by the Constitution to do so herein . . . .' California Company v. State Oil and Gas Board, et al, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120, 121."

Nor is the advantage to the administration of justice by a clarification of the matters on which an advisory opinion is sought a persuasive argument for rendering same, there being no such authority in the court under the Constitution and laws of the State.[9]

As to what justiciable controversies are "cognizable in said court" within the meaning of Section 1945 of the Code of 1942, there actually seems to be but little question, once the finality provision of that section is satisfied. As the Court early held, it may hear and determine all

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[4]Jones v. Cashin, 133 Miss. 585, 98 So. 98 (1923).

[5]Craig v. Barber Brothers Contracting Co., 190 Miss. 182, 199 So. 270 (1940).

[6]Van Norman v. Barney, 190 Miss. 581, 25 So.2d 324 (1946).

[7]Moran v. Murphy, 187 Miss. 633, 193 So. 29 (1940); Sellier v. Board of Election Commissioners of Harrison County, 174 Miss. 360, 164 So. 767 (1935); Whidden v. Broadus, 108 Miss. 664, 67 So. 155 (1915); Rawlings v. Claggett, 174 Miss. 845, 165 So. 620 (1936); Cf. State ex rel. Whall v. Saenger Theaters, 190 Miss. 391, 200 So. 442 (1941); Sartin vs. Barlow ex rel. Smith, 196 Miss. 159, 16 So.2d 372 (1944).

[8]205 Miss. 264, 38 So.2d 718 (1949).

[9]Gipson v. State, 203 Miss. 434, 35 So.2d 327, *Sugg. of Error Overruled,* 36 So.2d 154 (1948); Gangloff v. State, 99 So.2d 461, (Miss. 1958).

motions and issues necessary to the exercise of its appellate power, and necessary to the preservation of its dignity and the enforcement of its orders.[10]

The tribunal from which the appeal is taken must, of course, have jurisdiction in the first instance, or the Supreme Court can have none. And this objection, being jurisdictional, may be raised for the first time before the Supreme Court, and the Court may, as in other cases of lack of jurisdiction, dismiss such an appeal of its own motion.[11]

Complementing Section 1945 of the Code of 1942, in its appeal requirement of final judgment, except in cases particularly provided for, is Section 1147 of the Code of 1942, here set out in full:

> "An appeal may be taken to the Supreme Court from any final judgment of a Circuit Court in a civil case, not being a judgment by confession or from any final decree in the Chancery Court, not being by consent, by any of the parties or legal representatives of such parties; but such appeal shall operate as a supersedeas only when the party applying for the same shall comply with the terms hereinafter prescribed; and in no case shall such appeal be held to vacate the judgment or decree."

A summary of the construction that has been accorded this last Section should conclude this introduction on the jurisdiction and general function of the Supreme Court, and prepare the way for a study of the progress of an appealed case from the first to the last step, which study will constitute the next, and principal portion of this article.

A final judgment of a circuit court, to be appealable, must be one which adjudicates the merits of the controversy.[12] However, in *Solomon v. Continental Baking Company*,[13] the Court positively stated that though a judgment of involuntary dismissal without prejudice does not finally terminate the rights of the parties, it is a final determination of that particular suit, and is to be understood as final for appeal purposes. The Court there disapproved and expressly overruled the broad statements implying the contrary in some earlier cases.

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[10]Planters Insurance Co. v. Kramer, 47 Miss. 200 (1872); Brown v. Carraway, 47 Miss. 668 (1873).

[11]Ball, Brown & Co. v. Sledge, 82 Miss. 747, 35 So. 214 (1903); Rodgers v. Hattiesburg, 99 Miss. 639, 55 So. 481 (1911); Rayborn v. Cothern, 43 So. 70 (Miss. 1907); Jones v. State, 47 So. 479 (Miss. 1908); Murphy v. Hutchinson, 47 So. 666 (Miss. 1908); Donald Brothers Mercantile Co. v. Marsh, 48 So. 230 (Miss. 1909); McCoy v. McRae, 204 Miss. 309, 37 So.2d 353 (1948); Ruff v. Montgomery, 83 Miss. 184, 35 So. 465 (1903); Travillion v. State, 206 Miss. 236, 39 So.2d 773 (1949); Waits v. Black Bayou Drainage District, 186 Miss. 270, 185 So. 577 (1939); J. R. Watkins Co. v. Guess, 196 Miss. 438, 17 So.2d 795 (1944); Ainsworth v. Blakeney, 227 Miss. 544, 86 So.2d 501 (1956).

[12]Roach v. Black Creek Drainage District, 206 Miss. 794, 41 So.2d 5 (1949); Bank of Courtland v. Long Creek Drainage District, 133 Miss. 531, 97 So. 881 (1923); G. and S. I. RR. Co. v. Williams, 109 Miss. 549, 68 So. 776 (1915).

[13]174 Miss. 890, 165 So. 607 (1936).

In the case of *Roach v. Black Creek Drainage District,*[14] the sustaining of defendant's demurrer to a petition for a writ of mandamus was held to be merely interlocutory, and so not appealable. In reannouncing the rule, the Court quoted from its opinion in *State Ex Rel Rice, Attorney General v. Large,*[15]as follows:

> " 'No appeal is allowable from a Circuit Court judgment unless the judgment is in all respects a final judgment, Sections 13, 3361, Code of 1930; Moore v. Montgomery Ward and Company, 171 Miss. 420, 156 So. 875; and, of course, an order ruling on a demurrer and which goes no further than simply to rule on the demurrer, is no final judgment, Pine Lumber Company v. Covington County, 87 Miss. 706, 40 So. 260 . . . .' "

And, in the *Bank of Courtland v. Long Creek Drainage District* case,[16] the reason given by the Court for not allowing an appeal from a judgment ruling upon a demurrer was that it did not "state that the plaintiff recover nothing from the defendant; neither does it acquit the defendant of liability and tax the costs against the plaintiff."

Where in a quo warranto proceeding the defendant appeared and filed two special pleas, the demurrer to each of which was overruled, and no further steps taken, nor final judgment rendered, an order allowing an appeal by the State in order "to settle the principles of law involved in said suit" was erroneous.[17]

The finality of a judgment for purposes of appeal is suspended until the disposition of a motion to set it aside,[18] or of a motion for a new trial.[19] And if a new trial is granted, no appeal can be taken until the same is accomplished.[20] The fact that the trial court has full control over its judgment during the whole of the term at which it was rendered does not serve to postpone the finality of a judgment past the date of the rendition. The date of the rendition of a judgment at law is the pronouncement thereof by the court at the conclusion of the trial, and this date is determined by the entry of the judgment on the minutes of the court.[21] Sections 1146, et seq, of the Code of 1942, establish the mechanics of an appeal to the Supreme Court. Of these, Section 1147 has already been noticed.

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[14]206 Miss. 794, 41 So.2d 5 (1949).
[15]171 Miss. 330, 157 So. 694 (1934).
[16]133 Miss. 531, 97 So. 881 (1923).
[17]State ex rel. Rice, Attorney General v. Large, supra at note 15.
[18]Johnson v. Mississippi Power Co., 189 Miss. 67, 196 So. 642 (1940).
[19]Shaw v. Bula Cannon Shops Inc., 205 Miss. 458, 38 So.2d 916 (1949); Moore v. Montgomery Ward and Co., 171 Miss. 420, 156 So. 875 (1934); Cf. Edwards v. Peresich, 221 Miss. 788, 74 So.2d 844 (1954).
[20]Brown v. Carraway, supra note 10; Haise v. Lorch, 47 Miss. 685 (1873); Y. & M.V.R.R. Co. v. Reid, 90 Miss. 616, 43 So. 952 (1907).
[21]Johnson v. Mississippi Power Co., supra note 18; Greene v. Callon, 102 So.2d 676 (Miss. 1958).

Section 1146 of the Code of 1942, abolishes writs of error, and provides that all cases, civil and criminal, at law and in chancery, are to taken to the Supreme Court by appeal as provided in this Chapter—and shall be dealt with by said Court without regard to the manner of removing the cases to the court.

This statutory method of review by appeal is exclusive of all others, and there is no authority for the Supreme Court's reviewing a case by certiorari.[22] There follows a step by step resume of this exclusive statutory method of review, which may bring to light in the reading, as it did in the writing, certain procedures and case law on the subject not heretofore fully appreciated.

> "The mode of obtaining an appeal from any judgment or decree, other than such as are provided for to be granted by the court or chancellor, shall be by petition, in writing, to the clerk of the court where the judgment or decree was rendered, or where the record of the judgment or decree to be appealed from may be."[23]

> "The petition for appeal need only state the rendition of the judgment or decree to be appealed from, and ask for an appeal; and such petition shall be marked by the clerk 'filed' and shall be dated and the marking filed shall be signed by him; and he shall copy said petition, with the endorsements on it, in the transcript of the record to be made by him; and the time of presenting such petition for an appeal shall be considered the time of taking the appeal, if bond be then given as required."[24]

However,

> "A written petition for an appeal shall not be necessary to its validity, but filing in the office of the Clerk of the Supreme Court a transcript of the record of the case in which the appeal is taken shall confer jurisdiction on the Supreme Court to try and dispose of the case; and where there is no petition for the appeal, it shall be considered to have been taken when the appeal bond was filed; or, if there be no bond, from the time of filing the transcript of the record in the office of the Clerk of the Supreme Court."[25]

Section 1174 of the Code of 1942, should be considered with the foregoing, providing as it does that:

"Except as herein otherwise provided, an appeal shall not be considered as perfected, nor a supersedeas awarded thereon, unless the bond required shall have been given and approved."

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[22]Shapleigh Hardware Co., Inc. v .Brumfield, 159 Miss. 175, 130 So. 98 (1930).
[23]Miss. Code Ann. § 1154 (1942).
[24]Miss. Code Ann. § 1155 (1942).
[25]Miss. Code Ann. § 1160 (1942).

The foregoing sections are not altogether clear, without the judicial interpretation they have received, and as those cases have construed them, they could have been more directly phrased to advantage.

Section 753 of the Code of 1942, appearing under the Chapter: "Limitations of Action," prescribes the time within which an appeal must be taken. The section, which has a savings clause for infants and insane persons, provides that appeals to the Supreme Court shall be taken within ninety days next after the rendition of the judgment complained of and not after.

These clarifications upon this very basic matter of perfecting the appeal, and within the prescribed time limitation, have been made: If an appeal bond is required by law, the appeal can be perfected only by filing the prescribed bond within the ninety day period.[26] More will be said later of the necessity for and the requirements of the appeal bond. The tender of the appeal bond without anything more is sufficient to perfect the appeal,[27] the petition for appeal being mere surplusage and formality. The appeal bond may be approved by the Clerk of the Court from which the appeal is taken.[28] If a petition for appeal is not presented in writing to the clerk of the trial court, and no appeal bond is filed or required, then the transcript of the record must be filed with the Supreme Court Clerk within the period for appeal. If the transcript is not so filed, even though the delay is caused by the clerk's negligence, the appeal is barred.[29] An appeal may not be barred, however, where there is a question as to the necessity for an appeal bond, (one not being filed though actually required) and the petition for appeal is timely presented to the trial court clerk, and though the record transcript is not filed with the Supreme Court Clerk within the time prescribed, if it appears that under the circumstances a real effort in good faith was made to take the appeal, without intentional delay, or damage or prejudice to the other side.[30] The proper perfection of an appeal to the Supreme Court within the time allowed by statute is jurisdictional to the appeal.[31] As has been seen, however, in certain unusual cases, the letter of the law may be relaxed in its application.

If there are court reporter's notes of testimony which must be transcribed, and which the appellant wishes to include in the appeal record,

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[26]Miller v. Phipps, 152 Miss. 437, 119 So. 170 (1928); Duncan v. Brock, 216 Miss. 406, 62 So.2d 562 (1953); Davidson v. Hunsicker, 224 Miss. 203, 79 So.2d 839 (1955); G. M. and O. R. Co. v. Forbes, 228 Miss. 134, 87 So.2d 488 (1956).

[27]Schwartz v. McKay, 184 Miss. 422, 185 So. 200 (1938).

[28]Miss. Code Ann. § 1173 (1942).

[29]Oswalt v. Austin, 192 Miss. 653, 6 So.2d 924 (1942).

[30]Sabougla Drainage District v. People's Bank and Trust Co., 191 Miss. 331, 1 So.2d 219 (1941).

[31]G. M. & O. R. R. Co. v. Forbes, supra note 26; Davidson v. Hunsicker, supra note 26; Henry v. Field, 200 So. 726 (Miss. 1941).

then he must heed the ten day jurisdictional period within which notice is to be given to the court reporter. Section 1640 of the Code of 1942, appearing under "Court Reporting" prescribes that any such person shall notify the court reporter in writing within ten days after the adjournment of the court of the fact that a copy of the notes is desired. The notice must be handed to the court reporter personally, or mailed to him at his usual place of abode. The attorney making the request shall file with the clerk of the court a copy of the notice, with a statement as to how the notice was served. Section 1191.5 of the Code of 1942, provides for the appellee's giving of such notice if he desires where it is not given by appellant.

The giving of the notice to the court reporter required by Section 1640 is jurisdictional,[32] and if the notice there called for is not timely given, the reporter's notes cannot be considered, and will be stricken from the appeal record; nor does the Supreme Court have any authority to require by its order their transcription or forwarding. And if the notes are necessary to the consideration of the appeal, their absence will require dismissal of the appeal.[33]

The time for this notice only begins to run after the judgment becomes final and appealable; that is, after all motions are disposed of, before or after adjournment of the court for the term.[34] Nor is a notice valid where given prior to the disposition of a motion for a new trial which was under consideration by the court.[35] The ten day period runs from the time the court actually adjourns, and not from the expiration of the time allowed by law for holding the particular term of court.[36] Although the notice provided for in Section 1640 is said to be jurisdictional, the court has said:[37]

> "This entire statute in reference to stenographer's notes should be liberally construed in aid of litigants prosecuting in good faith appeals to this court, and in effectuating the manifest scheme and purpose of the act to enable the Supreme Court to exercise its constitutional appellate jurisdiction."

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[32]McGee v. State, 203 Miss. 609, 35 So.2d 628 (1948); Mayflower Mills v. Breeland, 168 Miss. 207, 149 So. 787 (1933); Ocean Springs Bank v. Frederick, 145 Miss. 553, 110 So. 366 (1926); Jackson Opera House Co. v. Cox, 188 Miss. 237, 191 So. 665 (1939).

[33]Peck and Hills Furniture Co. v. Greer, 166 Miss. 248, 146 So. 311 (1933); American Creosote Works v. Rose Brothers, 211 Miss. 173, 51 So.2d 220 (1951); Ivy v. Robertson, 220 Miss. 364, 70 So.2d 862 (1954); Ruiz v. Ruiz, 101 So.2d 533 (Miss. 1958); Redmond v. Hilliard, 190 Miss. 839, 200 So. 130 (1941); Shaw v. Bula Cannon Shops, Inc., supra note 19; Ashe v. Ballard, 223 Miss. 397, 78 So.2d 476 (1955); Gandy v. Kirkland, 224 Miss. 508, 80 So.2d 767 (1955).

[34]Young v. Alexander, 122 Miss. 643, 84 So. 697 (1920); Tullos v. Simpson County, 124 Miss. 121, 86 So. 358 (1920).

[35]Mayflower Mills v. Breeland, supra note 32; Redmond v. Hilliard, supra note 33; Shaw v. Bula Cannon Shops, Inc., supra note 19.

[36]Dunn v. Green, 124 Miss. 602, 86 So. 852 (1921).

[37] N. O. and N. E. Ry. Co. v. Catts, 109 Miss. 340, 68 So. 483 (1915).

Having perfected his appeal, and given notice to the court reporter, the appellant must now obtain service of process upon the appellee summoning him to answer the appeal. Sections 1186 and 1189 of the Code of 1942, are the basic sections concerning this point. The first provides for service by the sheriff of the proper county upon the appellee or his attorney of the summons to appear and answer the appeal, the process to be served at least ten days before the time when it is returnable. A summons served within ten days of its return date shall be good for the term next after that to which it is returnable. It is the duty of the trial court clerk, under Section 1189, in all civil cases where the appeal is not perfected during the term of the court at which the judgment complained of is rendered, to issue this summons to the appellee.

The most recent judicial discussion of these two sections is found in *Home Insurance Company v. Watts*,[38] where the court held that compliance with the provisions of Sections 1186 and 1189 is jurisdictional and not procedural, that if no process is had, if the appeal is not taken during the specified term of court, if there be no formal waiver of process, and if no appearance to the appeal is entered by the appellee, then no valid judgment can be entered against the appellee by the Supreme Court. In that case, the court availed itself of Rule 33 and its provision for relaxing the rules in special cases, here to the extent of allowing a second suggestion of error to be filed in order to present this jurisdictional obstacle to its judgment.

There is no statute fixing the time when the summons to answer the appeal shall be served, but it is a rule of court established by long practice that the writ shall be returnable to the first return date which is more than ten days after the appeal is perfected as above.[39] Return days for appeals are prescribed by Sections 1942 and 1955 of the Code of 1942, as supplemented by Rule 8 of the revised rules of the Mississippi Supreme Court. They are: The first day of the two terms of court, being the second Monday in September and the first Monday in March; and the first Monday of January, May and July.

Sections 1156 - 1159, of the Code of 1942, provide for the summoning of parties to a judgment or decree who do not initially join in the appeal, and requires them to join if they desire, or be barred from further right to appeal. Where all parties against whom the judgment was rendered do not join in the appeal and no summons is issued to those

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[38]93 So.2d 848 (Miss. 1957); See also Cassidy v. Central Lumber Co., 219 Miss. 96, 67 So.2d 266 (1953); McAllister v. Richardson, 101 Miss. 132, 57 So. 547 (1912).

[39]Weir v. Killian, 59 Miss. 520 (1882); Meridian Coca-Cola Bottling Co. v. Watson, 163 Miss. 486, 138 So. 407 (1931); Yazoo and M.V. Ry. Co. v. McCarley, 106 Miss. 92, 63 So. 335 (1913); McAllister v. Richardson, supra note 38; Cf. Society of N. Y. Hospital v. Knox, 57 Miss. 600 (1880); Childs v. Rowell, 58 Miss. 512 (1880).

not joining, the appellee may have such summons issued; otherwise the appeal must be dismissed.[40]

Having followed the above procedures, the appellant need do nothing until the return day for the appeal. As has been noted, this is the first return day which is more than ten days after the perfection of the appeal. On that date, it is incumbent upon him to "take notice that the clerk is required to send the appeal to the Supreme Court, where the cause will be docketed, and, if the record is not here on the return day, and the stenographer has not had the requisite time required by law in which to file his notes, that fact should be suggested to the court."[41]

It is the trial court reporter and clerk who are charged by statute with the proper preparation, circulation and transmittal of the appeal record, and once the appellant has followed the steps that have been outlined, the duties of those officials regarding the appeal are clear.

Section 1640 provides that upon receipt of the aforementioned notice from appellant, the court reporter shall immediately acknowledge receipt thereof and transcribe and file his notes with the trial court clerk within sixty days after the filing and approval of the appeal bond in cases where appeal bonds are required; and where such bonds are not required by law, within sixty days of the giving of such notice.

Section 1641 of the Code of 1942, provides for the appellant's examination and correction of the reporter's transcript for ten days and the reporter's mailing of notice to the attorneys in the case that he has filed his transcript with the trial court clerk. After that ten day period, the appellant's counsel shall deliver or mail the transcript to an attorney representing the appellee, attaching a certificate of the date of such mailing or delivery. The appellee's counsel shall be entitled to have the use of this transcript for five days from the date of the mailing or delivery by the appellant, for examination and suggested corrections therein. At the end of these five days, the transcript shall be returned to the trial court clerk. If corrections or suggestions as to alterations are made by either attorney, then the clerk shall forthwith deliver in person, mail or express the notes with all suggested corrections to the trial judge, who shall make such corrections as may be proper, and forthwith return the transcript of the notes to be corrected to the court reporter, who shall make all such corrections as the trial judge shall direct and return the same to the judge within ten days, who shall thereupon sign and return the notes to the clerk of the court, which shall be considered a correct transcript. But if both parties to the litigation, or their attorneys, shall

[40]Tardy v. Rosenstock, 118 Miss. 720, 80 So. 1 (1918); U. S. F. & G. Co. v. Jackson, 123 Miss. 676, 86 So. 456 (1920).

[41]Warren v. State, 165 Miss. 783, 144 So. 698 (1932); Cf. Miller v. Phipps, supra note 26; Stewart v State, 179 Miss. 31, 174 So. 579 (1937).

enter upon the court reporter's notes, or file in the Supreme Court, a written agreement, that the same as originally filed, or as subsequently modified by agreement are correct, such transcribed notes shall become a part of the record in the case without the approval of the trial judge.

Counsel must avail themselves of this "simple and adequate method" for correction of the transcript, and if they do not, a valid excuse should be offered as a predicate for a petition to correct the record after filing in the Supreme Court, and, in any event, the application for the correction should be made before the submission of the case to the Supreme Court.[42]

Section 1642 of the Code of 1942, provides for the trial judge's granting to the court reporter for good cause shown, an extension of time for completing his transcript, such extension not to exceed thirty days.

Section 1643 of the Code of 1942, provides that if the notice to the court reporter is given, then no court reporter's transcript of his notes shall be stricken from the record in the Supreme Court for any reason, unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record as provided by the chapter of the Code entitled "Court Reporting."[43]

Section 1644 of the Code of 1942, provides for the trial court clerk's transmittal of the appeal record, including the court reporter's transcript, to the Supreme Court Clerk.

Section 1189, already mentioned above, should be referred to again, providing as it does for the trial court clerk's immediately making and certifying a transcript of the record of the case to the Supreme Court, "when the appellant shall have complied with the law applicable to his appeal." The quoted phrase has been held to require such certification and transmittal only when the statutory time for the preparation, examination, correction and return of the reporter's transcript has expired, and then by the first return day thereafter, which obviously may be later than the return day for the appeal.[44]

Notice should be taken here of Rules 1, 2, 3, and 29, of the Revised Rules of the Supreme Court of Mississippi, entitled respectively, "Transcript—How Prepared;" "Transcript—What to contain;" "Agreed transcript," and Original Papers—When Considered."

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[42]National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724 (1934), 157 So. 91 (1934); Great A. and P. Tea Co. v. Majure, 176 Miss. 356, 168 So. 468 (1936); Cf. Butler v. State, 217 Miss. 750, 65 So.2d 244 (1953).

[43]Redmond v. Hilliard, supra note 33; But Cf. Furr v. Brookhaven Creamery Co., 188 Miss. 1, 191 So. 684 (1939), Wilkinson v. Love, 149 Miss. 517, 111 So. 457 (1927).

[44]Yazoo and M. V. Ry. Co. v. McCarley, supra note 39; Hicks Mercantile Co. v. Musgrove, 108 Miss. 776, 67 So. 213 (1915).

Section 1644 also provides for the preparation of a bill of exceptions, setting forth appellant's conception of the evidence, rulings, etc., at the trial, under certain circumstances where the transcript of the reporter's notes is not available for consideration upon the appeal.[45]

In *Warren v. State,* supra at note 41, the court held that:

> "If the stenographer does not file his notes within the time allowed by law, counsel should take appropriate steps before the Circuit Court or the judge, to compel the filing of the notes, and should make a motion in this court that the case be passed until the notes can be obtained and the record filed here. Also, if the stenographer does not file his notes within the time allowed by law, the appellant should prepare a bill of exceptions containing the substance of the notes and present it to the Circuit Judge for approval, giving notice thereof to opposing counsel of the hearing before the judge. See Sections 725 to 730, inclusively, Code of 1930 (Sections 1640 - 1645, Code of 1942)."

It is likewise the duty of the appellant to invoke the aid of the Supreme Court to obtain a completed record when it appears that same has not been filed on or before the return day.[46] Read in the light of *Y. and M. V. R. Co. v. McCarley,*[47] which the Court cites, this return day would not necessarily be the return day for the appeal itself. A writ of certiorari from the Supreme Court is the proper remedy to seek in such a case, directing the clerk of the trial court to send up or complete the appeal record. Such relief must be invoked by the appellant without delay, however;[48] and, in *Miller v. Phipps,*[49] it was held that (there being no reporter's notes to copy):

"It is error for counsel to assume that, when the return day arrives, and the record is not filed by the clerk, they may delay application for the aid of this court."

A writ of certiorari from the Supreme Court is also the proper means to require the trial court clerk to send up parts omitted from the transcript of the record,[50] or properly to certify a record.[51] Rule 4 of the revised rules provides that:

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[45]See also concerning bills of exception, Miss. Code Ann. §§ 1531-1535 (1942).

[46]Cassidy v. Central Lumber Co., supra note 38.

[47]See note 39 supra.

[48]Walden v. State, 127 Miss. 486, 90 So. 177 (1922); Miller v. Phipps, supra note 26; Cobb v. Frazer, 209 Miss. 603, 48 So.2d 124 (1950).

[49]See note 26 supra .

[50]Aluminum Cooking Utensil Co. v. Shivers, 149 Miss. 197, 115 So. 345 (1928); Patridge v. McAtee, 225 Miss. 141, 81 So. 2d 714 (1955); Cf. Williams v. State, 178 Miss. 694, 172 So. 746 (1937); Sovereign Camp W. O. W. v. Duncan, 175 Miss. 724, 165 So. 546 (1936); Sims v. Crecink, 208 Miss. 873, 45 So.2d 737 (1950); Gaw v. City of Holly Springs, 87 So.2d 252 (Miss. 1956); Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929); Cf. Richmond v. Enochs, 109 Miss. 14, 21, 67 So. 649 (1915).

[51]Davis v. Davis, 37 So.2d 735 (Miss. 1948).

> "If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the court may impose, or it may be refused altogether."

The alleged failure of the clerk below to incorporate in the record a bill of exceptions, and the alleged incorporation of matter not properly there, should be brought to the Supreme Court's attention by motion pointing out what portions should be stricken, and what portion the clerk failed to include in the appeal record, and not by motion to remand to perfect the record.[52]

Concerning the above mentioned duty of the appellant to act if the appeal record has not been filed with the Supreme Court Clerk by the return day, the court clarified its view of this problem in *Cobb v. Frazer*.[53] There, it discounted appellant's argument that: Prejudice to appellee must be shown before a dismissal will be granted, and that even a dismissal will not be allowed if appellant is guilty of no negligence, and that because of a crowded docket, the case could not have been reached during the past term anyway. The court followed the earlier cases and held the appellant to be negligent in not applying for certiorari when the return day for the record had passed; that the cause had been unduly delayed to appellee's prejudice because of failure to prosecute the appeal with diligence; and, that there was no sufficient showing of excuse for the default. The court concluded that the appeal should be dismissed under the provisions of Section 1966 of the Code of 1942. That Section provides that it shall be lawful for the court, on appellee's motion, to dismiss an appeal when the appeal record shall not be filed with the Supreme Court Clerk on or before the return day to which the appeal is returnable by law or by rule of court.

Assuming that all of the foregoing steps and procedures have been timely followed by the parties specified, the case is now properly on appeal before the Supreme Court. Section 1949 of the Code of 1942, requires the Clerk of the Supreme Court to make out and keep a docket of all civil cases pending in or which may be brought to the court, and to place thereon all such cases in the order in which they may be filed. Section 1962 of the Code of 1942, provides that the Supreme Court shall hear

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[52]Brasswell v. Board of Supervisors of Copiah County, 183 So. 278 (Miss. 1938); See also the following: Stewart v. Highway Commission, 185 Miss. 328, 186 So. 633 (1939); Mauney v. Gulf Refining Co., 193 Miss. 421, 8 So.2d 249 (1942); Carroll Notion Co. v. Neville, 217 Miss. 699, 65 So.2d 140 (1953); Swaney v. White, 92 So.2d 453 (Miss. 1957); Freeman v. Mississippi Power and Light Co., 92 So.2d 453 (Miss. 1957); Shows v. City of Hattiesburg, 92 So.2d 365 (Miss. 1957); Sly v. Gilliland, 207 Miss. 356, 42 So.2d 393 (1949); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So.2d 443 (1951).

[53]See note 48 supra.

and determine all cases properly brought before it at the return term, unless cause be shown for a continuance.

Rule 9 of the Revised Rules provides that, except as may be provided by special order, all civil cases will be called for argument and submitted in the order in which they stand on the docket. It further provides that at least forty-five days before the first Monday of each month, the clerk shall mail to each lawyer or firm interested therein a list of cases to be called during that month; and that on the assembling of the Court on each Monday, the entire number of cases set for the week will be called, with a view to the disposition of such of them as are not to be argued.

Rule 6 of the rules provides for the appellant's filing of his assignment of errors at least thirty days before the date when a case is set for hearing. This assignment "shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel." This rule also provides that "no error not distinctly assigned shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not assigned or distinctly specified."

"The right of an appellant to obtain a review in this court of any ruling made in the trial court shall not depend in anywise upon his having filed in such court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified."

The appellant's main brief must also, under Rule 7, be filed and delivered at the same time. If appellant's main brief is mailed, there must be a certificate therewith that the mailing was done not later than two days before the due date for the filing. The same rule requires the appellee's brief to be filed not later than ten days before the day the case is set for argument, and the appellant's reply brief not later than three days before that date. The rule further provides that it: "Shall not apply where counsel have entered into a written agreement, filed with the clerk, relative to the filing of briefs, but no brief shall be filed after the case has been submitted, except by leave of the court first obtained." The rule also provides for the suggested form and style, and physical make-up of appellate briefs, and for certificates of delivery.

At this point, the broad authority of Sections 1958 and 1959 of the Code of 1942, should be noted. These sections have as their object the curing of defects in appeals by Supreme Court process, in order that appeals shall not fail because of defects and irregularities therein. Those sections read as follows:

> "May make all orders and issue process. The Supreme Court may make all orders and cause to be issued and executed all process

necessary or proper to secure an appeal to it from any judgment or decree from which an appeal may be taken to the Supreme Court, and to compel the production before it of a full and perfect transcript of the record and proceedings in any case in which an appeal to said court is provided for by law, and of all papers necessary to the disposition of any case or matter properly before it."

"1959. Appeal not to fail for certain things. An appeal to the Supreme Court shall not be dismissed for want of jurisdiction because of a defect in the application for appeal, or in the bond, or because of any failure by an officer to comply with the requirements of law in reference to appeals; but all defects and irregularities may be cured by amendment, so as to perfect the appeal and obtain the judgment of the Supreme Court in the case; but the court may dismiss an appeal for a failure of the appellant to do, within a reasonable time, what may be necessary to perfect his appeal."

Of the second Section, it was recently said:[54]

"This statute is broad in its terms and we should not limit its application to trivial defects and irregularities. It should be liberally construed in favor of allowing the case to reach final judgment on the merits."

Rule 21 of the Revised Rules should be noticed here. It provides that:

"When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution."

Rule 10 of the Revised Rules concerns argument of counsel, providing that only two counsel may be heard for each party in a case, and also provides for the time allowed for argument, and its apportionment.

The Supreme Court may try and determine all issues of fact which may arise out of any appeal before it, and which are necessary to the disposition thereof, and may by order in each case prescribe in what way evidence may be produced before it on the issue.[55] An example of the application of that Section is found in *McInnis v. Simmons*.[56] There, the court received affidavits in order to determine whether title to a judgment on which the appealing execution creditor relied had been transferred to a third person.

Nevertheless, the appeal must be considered upon the record as

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[54]Snipes v. Commercial and Industrial Bank, 225 Miss. 345, 83 So.2d. 179 (1955).
[55]Miss. Code Ann. § 1960 (1942).
[56]162 Miss. 606, 139 So. 872 (1932).

made in the trial court except for such "issues of fact which may arise out of any appeal."[57]

Section 1962 provides also that if there is a reversal of the lower court's judgment, the Supreme Court shall render such judgment as the court below should have rendered, unless it is necessary in consequence of its decision that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in which cases, the suit shall be remanded for a final decision; and when so remanded shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law in the absence of such direction.[58]

Rule 11 of the Revised Rules provides, importantly:

> "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

Rules 12 and 13 authorize the granting of new trials as to part only where applicable, and new trial as to damages only, where applicable.

In case the judgment appealed from is affirmed, or the appellant fails to prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages at the rate of five per cent and costs.[59] The effect of an affirmance is simply to establish or confirm the validity of the judgment from and as of the date of its rendition in the court of original jurisdiction.[60]

The Code of 1942[61] requires the certification by the Supreme Court Clerk to the trial court clerk of each final judgment rendered by the Supreme Court within twenty days after the rendition of the judgment, if the costs accrued in the Supreme Court be paid to him. If the clerk fails to issue the certificate as required, he shall forfeit to the aggrieved party one hundred dollars to be recovered by motion before the Supreme

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[57]Graham v. Graham, 214 Miss. 99, 58 So.2d 85 (1952); Federated Mutual Implement and Hardware Insurance Co. v. Spencer, 219 Miss. 68, 67 So.2d 878 (1953); Wilder v. Currie, 97 So.2d 384 (Miss. 1957); International Order of Twelve v. Barnes, 204 Miss. 333, 37 So.2d 487 (1948); Adams v. Bounds, 224 Miss. 518, 81 So.2d 235 (1955); Martin v. Gill, 182 Miss. 810, 181 So. 849 (1938); Alexander v. Hancock, 174 Miss. 482, 164 So. 772 (1935); *Sugg. of Error Overruled*, 174 Miss. 482, 165 So. 126 (1936).

[58]Cf. California Co. v. State Oil and Gas Board, 200 Miss. 824, 28 So.2d 120 (1946); Holcomb v. McClure, 217 Miss. 617, 64 So.2d 689 (1953); Sperry's Estate v. Sperry, 189 Miss. 321, 196 So. 653 (1940).

[59]Miss. Code Ann. §§ 1971 - 1972 (1942).

[60]Mississippi Power and Light Co. v. Town of Coldwater, 168 F. Supp. 463 (N. D. Miss. 1958); Early v. Board of Supervisors, 182 Miss. 636, 181 So. 132 (1938); Claas v. Continental Southern Lines, 225 Miss. 94, 82 So.2d 705 (1955).

[61]Miss. Code Ann. §§ 1990 - 1991 (1942).

Court on five days' notice. The proper construcion of this section requires the Supreme Court Clerk to certify a final judgment within twenty days after any suggestion of error shall have been disposed of, or if none has been filed, that he then certify the judgment within the period so prescribed after the time allowed under the rule for filing a suggestion of error, or the extended time granted under an order of the court for that purpose shall have expired.[62]

The Supreme Court has the inherent power to correct a judgment it did not intend to render, whether at the term in which judgment was entered, or at a subsequent term, and this may be suggested by motion.[63]

"The losing party may within fifteen days after an opinion is handed down file a written suggestion of error of law or fact therein. Upon good cause shown this time may be extended to thirty days, but an application for such an extension must be filed within the original fifteen days."[64] This rule further provides that no reply to a suggestion of error shall be filed unless the court, by special rule or otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained or overruled by the court, no further suggestion of error shall be filed by any party. The Supreme Court will rarely consider a new contention on suggestion of error, despite the rule of court (Rule 6) giving the court the option to consider plain errors overlooked by the appellant.[65] In that case the court said, quoting from *Eady v. State*.[66]

"As a general rule it is no more permissible on appeal to present a case in halves or by piecemeal than it would be on the original trial."

There is no provision for a suggestion of error in the court's action on motions to dismiss or motions to docket and set for hearing.[67] The full court will consider a suggestion of error only in the absence of a unanimous decision and continued accord by the five judges hearing the case.[68]

The appeal bond and writ of supersedeas are items of considerable importance, and should be discussed here in more detail. Section 1163[69]

62White v. State, 190 Miss. 589, 195 So. 479 (1940); See Edmonds v. Delta Democrat Publishing Co., 221 Miss. 785, 75 So.2d 73 (1954).

63Sample v. Romine, 193 Miss. 706, 10 So.2d 346 (1942); cf. Gayden v. Kirk, 208 Miss. 283, 44 So.2d 410 (1950); House v. Russell, 210 Miss. 57, 49 So.2d 809 (1951); Chrismond v. Chrismond, 213 Miss. 189, 56 So.2d 482 (1952); Covington County v. Miss. Road Supply Co., 59 So.2d 325 (Miss. 1952); Hunt Oil Co. v. Berry, 227 Miss. 680, 86 So.2d 854 (1956).

64Rule 14, Revised Rules of the Supreme Court.

65Delta Cotton Oil Co. v. Elliott, 174 So. 550 (Miss. 1937).

66153 Miss. 696, 697, 122 So. 199, 200 (1929).

67Johnson v. St. Catherine Gravel Co., 218 Miss. 713, 63 So.2d 393 (1953).

68Ryan Supply Co. v. Brett, 222 Miss. 30, 75 So.2d 721 (1954); c.f. Rule 35(5), Revised Rules of the Supreme Court.

69See also Miss. Code Ann. § 1170 (1942).

of the Code of 1942, sets out the requirements for an appeal bond where a supersedeas of the judgment appealed from is desired. The bond must be given by the appellant, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in the State, in a penalty of one hundred twenty-five per cent of the amount of the judgment or decree appealed from or one hundred twenty-five per cent of the amount of the value of the property or other matter in controversy, to be determined by the officer granting the appeal and conditioned that the appellant will satisfy the judgment or decree complained of, and also such final judgment as may be made in the cause, and all costs if the same be affirmed. A supersedeas shall not issue until such bonds have been given. Section 1188 of the ode of 1942, provides as follows:

> "When an appeal shall be taken, and bond for stay of execution given, the clerk shall not issue execution on the judgment or decree appealed from until such day shall end or be discharged; and if execution had been issued before the bond for stay of execution was given, the clerk shall issue a command to the officer in whose hands the execution may be to desist from enforcing it, and to surrender any property seized under it to the person from whom it was taken or who may be entitled to it."[70]

Section 1208 of the Code of 1942, provides that in all appeals the court may on motion of appellee or obligee inquire into the sufficiency of the amount of the bond and of the security thereon, and may at any time require a new bond, or additional security, on pain of dismissal; and if any bond be defective, the principal therein may give a new one, which shall have the same effect as if given originally.

As provided in Section 1162 of the Code of 1942, where no supersedeas is desired or allowed, it shall be sufficient for the appellant to give bond to the opposite party, with sureties, as in Section 1163, in the penalty of five hundred dollars, conditioned for the payment of all costs of the appeal in case the judgment or decree be affirmed as to the appellant. However, if the appellant prepays the cost of the transcript, a bond for the sum of one hundred dollars shall be sufficient, or the appellant may deposit that sum with the clerk in lieu of the bond. But if the transcript is not prepaid and no supersedeas is desired, if the clerk of the court or any party to the suit shall apprehend that the cost of the transcript of the record and of the appeal will exceed the five hundred dollar sum, such clerk or party may apply to the trial court, or the judge or chancellor in vacation, and an order may be made fixing the amount of such bond for costs of appeal.

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[70]Miss. Code Ann. § 1188 (1942).

Appeals with and without supersedeas have the same effect, except that the former operate to stay execution.[71]

In *Sartin v. Barlow*,[72] it was held that appeals to the Supreme Court with supersedeas in civil cases are matters of right only under Sections 1163, 1165 and 1167, and then only in three classes of cases: (1) where there is a money decree or judgment; or (2) where there is a decree or judgment for the recovery or against the retention of specific property; or (3) where the decree directs the sale or delivery of possession of real estate.

Section 1169 of the Code of 1942, however, provides that:

> "In any case of an appeal to the Supreme Court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from, or by the judge thereof, or by the Supreme Court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas."

Supersedeas under this section is within the sound discretion of the court or judge.[73]

Affirmative injunctive relief, denied the appellant by the lower court, may not be granted by the Supreme Court under this section under the guise of a writ of supersedeas.[74]

Section 1970 of the Code of 1942, which provides that the Supreme Court shall entertain a motion to discharge a supersedeas in an appeal before the return day for the appeal, has been held to have no application to a case arising under Section 1163, as this section unquestionably grants the right to appeal with supersedeas.[75]

Sections 1165 and 1167, mentioned above as allowing as a matter of right appeal with supersedeas in the cases specified, provide respectively for supersedeas of a writ of possession in ejectment, with a bond in a penalty equal to double the value of one year's rent of the subject land; and conditioned, if judgment is affirmed, to pay all costs and the value of the use and occupation of such land after the time of taking the appeal, and damages for waste or injury to the land, not embraced in its use and occupation after taking the appeal; and for supersedeas of a decree directing the sale or delivery of possession of real estate. In the lat-

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[71]Yazoo and M. V. Ry. Co. v. Adams, 78 Miss. 977, 30 So. 44 (1901).

[72]See note 7 supra.

[73]Sartin v. Barlow, supra note 7; Orkin Exterminating Co. v. Posey, 218 Miss. 611, 67 So.2d 526 (1953).

[74]Mississippi Power and Light Co. v. Town of Coldwater, supra note 60.

[75]Coulter v. Banks, 207 Miss. 276, 38 So.2d 696 (1949); Cf. Mississippi Power and Light Co. v. Town of Coldwater, supra note 60.

ter case, the penalty of the bond is double the value of the real estate to be surrendered, and the bond must be conditioned to pay all costs and damages, and not to commit or suffer to be committed any waste thereon, and to pay the value of the use and occupation thereof until the delivery of possession in case the possession is to be surrendered, if the decree appealed from shall be affirmed.

In all cases not specially provided for, the appeal bond may be made payable to the State; and where it is provided that such bond shall be made payable to the opposite party, it shall not be an objection to the bond that it is not payable to the proper person, but such bond shall be valid and binding on the obligors, and may be proceeded on in all respects as if it were payable as directed by law.[76]

Sections 1209 and 1210 of the Code of 1942, provide for appeal with supersedeas without bond by certain classes of appellants. These embrace executors, administrators and guardians, who have already given bonds as such, though in such appeals to the Supreme Court the appellant may be required to prepay the clerk for the transcript of record. Also specified are: the state, and any county, city, town or village thereof, and the officials representing same, and any state, county, city, town or village officer who is a party to any suit or action in his official character, in which suit or action the state, county, city, town or village is beneficially interested, and the several incorporated charitable or educational institutions established and maintained by the State, and all corporate instrumentalites wholly owned by the United States Government.

It should be here noted that Section 1212 of the Code of 1942, provides that in all suits against the board of supervisors of a county or the mayor and board of alderman of any city, town or village, or any other board, commission or other officer of any county, or municipality or district in their official capacity, any taxpayer or taxpayers of the county, municipality or district shall have the right at his or their own expense to employ private counsel to defend all suits instituted as above and may prosecute an appeal to the Supreme Court from any judgment or decree adverse to such officer if same does not so prosecute within thirty days from the date of the rendition of the judgment. And if such officer should desire to dismiss an appeal taken by him, it shall not be dismissed if any taxpayer of the county, municipality or district shall object thereto, but the court shall retain the cause and render decision therein upon the issues presented by such appeal; provided, however, that such taxpayer shall enter into bond for costs as provided in Section 1213, and shall be liable for all costs of such appeal should said cause be decided adverse to him.

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[76]Miss. Code Ann. § 1168 (1942).

Section 1213, just referred to, and 1214 of the Code of 1942, provide that where a taxpayer shall so prosecute an appeal, he shall only be liable for the actual costs of the appeal, and that it shall be necessary in order to prosecute the appeal for such taxpayer to file a bond, approved by the trial court clerk, in a sum sufficient to cover the costs; and that in such taxpayer appeals, all notices required by law to be served on the court reporter or other officer shall be sufficient if served thirty days after the filing of the bond for appeal by the taxpayer.

The foregoing discussion, and authorities cited, have necessarily not been exhaustive of the very broad subject matter treated. However, the article should be a useful guide, in its chronological treatment, to the preparation and prosecution of a civil appeal from the Circuit to the Supreme Court of Mississippi, and should serve as a starting point for a more detailed development of any particular point.

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